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Chairman: Mr. Gómez Robledo .... (Mexico)

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The meeting was called to order at 10.15 a.m.

Agenda item 80: The rule of law at the national and international levels (*continued*) (A/61/142)

1. **Mr. Barriga** (Liechtenstein) thanked all the delegations that had supported the joint request by Mexico and his country for the inclusion of the new item on the rule of law in the agenda of the General Assembly. The General Assembly's consideration of the rule of law would provide an opportunity to follow up on the commitments in that area made during the 2005 World Summit. Liechtenstein was deeply committed to the rule of law at the national and international levels. The rule of law encompassed both a procedural and a substantive aspect. The procedural aspect referred to an effective system of rules which was established in accordance with a higher set of rules and made legal decisions foreseeable to the greatest extent possible. The substantive aspect referred to the fact that the system of rules must reflect basic values of humanity, such as fundamental human rights.

2. For a small State, the rule of law was a question of essence, and at times even of survival, as it stood in opposition to the mere rule of power. At the international level, the work undertaken by the United Nations in the codification and development of international law represented a fundamental pillar of the rule of law. It was complemented by an impressive array of multilateral treaties concluded in the context of other international and regional organizations. Currently, the scope of international law was greater than ever before and touched upon virtually every aspect of life. That was a necessary development in the era of globalization, with the rule of law serving as a stabilizing factor in the interaction of Governments, organizations, companies and individuals.

3. However, the rapid development of international law and its sheer volume represented a challenge for many States which lacked the capacity to absorb international law fully into their domestic systems. The United Nations must clearly step up its technical assistance and capacity-building for the implementation of international law, expanding the scope of its activities and allocating adequate resources for them from the regular budget. The proposed rule of law assistance unit would be the appropriate place for the coordination of such activities. His delegation trusted that the plan to establish the unit would be implemented without further delay. Capacity-building on a bilateral basis could be equally valuable, particularly between States with similar legal systems. The United Nations could play a stronger role in coordinating such bilateral cooperation and collecting information regarding offers of and requests for technical assistance.

4. While the classic field of international law governing relations between States and between States and international organizations was well developed, as was the field of human rights law, much remained to be done in areas in which the activities of individuals or non-State entities were of concern to the international community. International criminal law, for example, was a relatively young discipline, and while it had seen a number of historic developments in the past decade — most prominently, the establishment of the International Criminal Court — those efforts needed to be continued, in particular through further ratifications of the Rome Statute and cooperation from States and from the United Nations system, especially in the areas of investigation and arrest. The work on the definition of the crime of aggression under the Statute deserved particular attention, and his delegation encouraged all States to participate actively in the open-ended Special Working Group dealing with that matter. Other areas deserving more attention in the context of international law included the responsibilities of transnational corporations and the activities of private military personnel. The International Law Commission would be well-placed to study ways of addressing those challenges.

5. The International Court of Justice, as the principal judicial organ of the United Nations, played a crucial role with regard to the rule of law. Liechtenstein greatly appreciated the work of the Court and called upon all States which had not yet done so to accept its jurisdiction in accordance with Article 36 of its Statute. His delegation also called upon the Court to consider ways and means of conducting its work more efficiently, allowing for more cases to be submitted and more decisions to be rendered per year, while maintaining the high quality of its work.

6. His delegation would welcome the adoption of a short resolution during the current session, underlining the central importance of the rule of law and requesting a report by the Secretary-General on the subject. The report might analyse the current status and trends of international law and identify existing and necessary future measures aimed at further strengthening the rule

of law, in particular through technical assistance and capacity-building. A stronger United Nations role in the area of the rule of law would require increased resources, both for the Office of Legal Affairs and for other parts of the United Nations system engaged in related activities. His delegation welcomed the proposal to choose a sub-topic for consideration by the Committee each year. A number of the topics that he had mentioned earlier would lend themselves to a more thorough examination, such as the future of international criminal law and the role of non-State actors in international law.

7. **Mr. Abdelsalam** (Sudan) said that he would not engage in a theoretical legal discussion but would focus on the applied aspects of the issue, which included the need for guiding principles and an enforcement mechanism. Guiding principles should be rigorous, objective and respectful of the cultural and religious characteristics of societies, and enforcement mechanisms should be coordinated between relevant United Nations agencies and their national counterparts within a consultative framework. in order for such a framework to be effective, the United Nations itself, which too often allowed the narrow interests of certain Members to predominate, needed to be reformed and commit itself to the rule of law in its internal functioning. National and regional experience in strengthening the rule of law should be taken into account, so as to bridge differences in approaches to jurisprudence. On a practical level, an integrated approach with working groups to tackle individual aspects should be adopted. Above all, the rule of law should not become a pretext for interference in the internal affairs of States and the application of political pressures by certain parties which shed crocodile tears over human rights while their hands were stained with the blood of innocents.

8. **Mr. Lauber** (Switzerland) expressed his delegation's satisfaction at the inclusion of the rule of law in the agenda of the Sixth Committee. Switzerland attached the greatest importance to the promotion of and respect for international law, which was the pillar of a just and peaceful international order. Promoting the rule of law was a fundamental and long-term undertaking which could only be advanced in a universal framework such as the United Nations. The General Assembly and its Sixth Committee should therefore play a leading role in the process, supported by the important work of the International Law Commission, with whose members the members of the Sixth Committee should strengthen their interaction. Clearly, however, all United Nations organs must respect and promote the rule of law in carrying out their functions.

9. For Switzerland, the concepts of the rule of law at the national level and the rule of law at the international level were complementary and interdependent, and the promotion of one helped to promote the other. There was already sufficient clarity regarding what the rule of law meant at the national level. In contrast, a basic concept of the rule of law in international relations, one that was sufficiently delimited and accepted, still did not exist. The definition of such a concept, or at least an outline of its main constituent elements, would make it possible to draft a coherent plan of action.

10. One of the measures that individual States could take to enhance respect for international law would be to recognize in their national legal systems the principle of the primacy of international law over national law and the obligation of all organs of the State to ensure, within the limits of their competence, that national law was consistent with the obligations of States under international law. The national courts, in particular, must strive to ensure respect for international law and must therefore have genuine enforcement authority.

11. At the same time, it was important to strengthen the capacity of all States to participate fully in international legislative processes in order to ensure the legitimacy and hence the universal acceptance of the laws adopted and thereby improve the possibilities for their implementation at the national level. The United Nations, along with other international organizations and individual States with sufficient resources, should provide technical assistance to States requiring such assistance, in conjunction with other public and private associations and organs of the State concerned. Concurrently, the General Assembly should improve its efficiency, focusing more on the substance of problems and less on their procedural aspects. In that connection, his delegation believed that consensus definitely did not require unanimity, and must not become an end in itself, as the Secretary-General had affirmed in his report "In larger freedom: towards development, security and human rights for all" (A/59/2005).

12. When the domestic mechanisms designed to ensure respect for a State's international obligations were not sufficient to prevent a conflict from arising,

the peaceful settlement of international disputes was obligatory, as one of the essential elements of the concept of the rule of law in international relations. The International Court of Justice was unquestionably at the heart of an international order based on the rule of law. Switzerland encouraged all States that had not already done so to accept the jurisdiction of the Court as compulsory, ipso facto and without special agreement, in relation to any other State accepting the same obligation, in accordance with the Court's Statute. The United Nations should also redouble its efforts to increase the number of States accepting that fundamental commitment.

13. Regarding the role of the United Nations Secretariat, Switzerland welcomed the activities already undertaken, particularly in the framework of the Strategy for an Era of Application of International Law — Action Plan. Switzerland strongly supported strengthening the Office of Legal Affairs, providing it with sufficient resources to enable it to carry out its functions in relation not only to promotion of the rule of law but also to the many legal aspects of United Nations activities in the field. The Office of Legal Affairs should also oversee the activities of the proposed rule of law assistance unit in promoting the rule of law in international relations so as to ensure the coherence of those activities within a global strategy.

14. Switzerland favoured the development of such a strategy and therefore welcomed the idea of asking the Secretary-General to prepare a report to form the basis for future discussions. The report might include an introductory conceptual analysis, suggesting a definition and delimitation of the concept of the rule of law at the international level. It might also include a list of current activities relevant to the subject and propose specific action for the coordination and future development of those efforts. The report should focus primarily on the role of the General Assembly and the Secretariat, but it would probably be useful also to consider the role and contribution of other organizations, such as the World Trade Organization and the Bretton Woods institutions, in relation to the rule of law. The report could be discussed by the Sixth Committee during the sixty-second session, after which the Committee might decide to concentrate on one or several specific topics during future sessions, thus establishing priorities.

15. **Mr. Alday** (Mexico) said that the rule of law lay at the heart of the 2005 World Summit Outcome, which had recognized the need for "universal adherence to and implementation of the rule of law at both the national and international levels" (A/RES/60/1, para. 134). However, the full import of those words could not be understood without a functional definition of the concept of the rule of law. The latter could be defined as the norm binding upon both the governing and the governed; it should be specific, public, prospective, generally applicable, stable and clear. Its function was to place limits on Governments. The rule of law (*état de droit*) was not the same as the state of the law, or legality (*état légal*), although the distinction was less obvious than it had once been, because of the current climate of relativism. For the rule of law to fulfil its proper function, there must be a general attitude of deference to the norm, an independent judicial authority to rule upon the law in a given situation, and a clear demarcation between the powers of the various authorities responsible for law and order. All too frequently, however, the subjects of the law regarded it as an alien transplant from one legal system to another, incompatible with the value system governing a particular community. The rule of law should therefore be defined as a common denominator of civilized international society, akin to "the general principles of law recognized by civilized nations" referred to in Article 38 (c) of the Statute of the International Court of Justice. The General Assembly could be requested to identify the elements of the rule of law at its next session, through a report by the Secretary-General based on the views of Member States. At the international level, the rule of law called for an international order based on compliance by States with international law, rather than a set of rules dictated by the Government in power or by emergencies. At the national level, the rule of law was essential to the organization of the State. It sought to ensure the proper exercise of State prerogatives through the separation of powers, to set legal limits to the use of authority, and to ensure that the laws adopted were non-retroactive, clear and precise, non-discriminatory and generally known to the public.

16. There was no fundamental conflict between State sovereignty and the rule of law, because the State was itself subject to the limits imposed by the rule of law, and had to respect the rights proper to other entities within the international system. Compliance by States with international norms was reconciled with their exercise of State sovereignty whenever they voluntarily undertook to be bound by the terms of a treaty, and whenever they were bound, in the absence of a treaty, by obligations *erga omnes* recognized by the international

community. Article 27 of the Vienna Convention on the Law of Treaties prohibited States from invoking internal law to justify a failure to comply with international law. Moreover, the jurisprudence of the International Court of Justice, in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility)* [1984], referred to the primacy of the rules in the Charter of the United Nations over all other international agreements.

17. The work of the International Law Commission relating to the codification and progressive development of international law was essential in order to define the international rules which served to strengthen the rule of law at the national level. However, treaties were not always effective in producing social change within States, either because States failed to adopt the necessary legislative or administrative measures to incorporate them into their internal law, or because the form in which they were incorporated was deficient in some way. In addition, some treaty rules, especially those which were not self-executing, called for further action by States to bring about full compliance at the national level. That was the case where conduct which was illicit under treaty law had to be criminalized in internal law, where the decisions of international courts had to be recognized and executed, and where the rules resulted in new rights for individuals. The United Nations and Member States were able to provide considerable technical assistance to States whenever it was needed in order to give effect to international law, and such assistance was especially necessary in building capacity for implementing human rights law. The United Nations could identify the treaties requiring the most administrative and legislative measures at the national level for their full implementation. It could also promote the preparation of legislative guides and model legislation or provisions, and training for government officials, legislators and judges involved in the application of treaty law.

18. Developments in international law had made it necessary to create specialized judicial organs, in addition to the International Court of Justice. It was sometimes argued that concurrent jurisdiction could result in the fragmentation of international law. He did not believe there was such a risk, because the jurisdiction of the courts and tribunals in question was expressly recognized by States, and they could not act outside the limits of that jurisdiction.

19. The rule of law was strengthened not only when disputes between States were referred to the various international courts, but also when the judgements of those courts were complied with. For that purpose, it was important to promote acceptance of the compulsory jurisdiction of the International Court of Justice, and the inclusion in international treaties of provisions for the referral to the Court, or to another tribunal, of any disputes which might arise from the application or interpretation of the treaties.

20. Decisions by international bodies should be accompanied by a statement of the facts prompting the decision and the reasoning which led to it. That was especially important in the case of resolutions of the Security Council, whether based on Chapter VI or Chapter VII of the Charter. In both cases, the decisions of the Council were governed by Article 25 of the Charter and were binding for the States concerned. The Council was, however, required to "discharge its duties in accordance with the purposes and principles of the United Nations" (Article 24 (2)). Notwithstanding the margin of discretion which it enjoyed, according to General Assembly resolution 3314 (XXIX), in determining the existence of acts of aggression under Article 39 of the Charter, the Council remained bound by the purposes and principles set out in Articles 1 and 2. When deciding that a threat to peace and security existed or that an act of aggression had been committed, the Council should refer to the international legal norm which had been violated and give legal reasons for its decision.

21. During the debate held in the Security Council on 20 June 2006, the representative of Mexico had proposed that more frequent use should be made of means of pacific settlement of disputes, in accordance with Chapter VI of the Charter, so as to leave no doubt that States were bound to comply with the obligation spelled out in Article 2, paragraph 3. When parties to a case before the International Court of Justice needed assistance to execute its judgment, the United Nations should provide it, and the Secretary-General should offer the necessary advice. There should also be more frequent recourse to the advisory jurisdiction of the Court, which had rendered valuable service to the international community. A recommendation could be made to the General Assembly to authorize the Secretary-General, acting on the same basis as a specialized agency, to request advisory opinions from the Court. The Security Council should refrain from

adopting decisions of a law-making kind. That was properly the function of the General Assembly, under Article 13 of the Charter. The Council could, however, encourage the General Assembly to codify and develop international law whenever it judged the existing legal framework to be inadequate to deal with threats to international peace and security.

22. He proposed that the Committee should continue its consideration of the current agenda item on an annual basis, identifying a limited number of sub-topics likely to strengthen the rule of law. The Secretary-General should be asked to prepare a report on each sub-topic chosen, accompanied by specific recommendations.

23. **Mr. Talbot** (Guyana), speaking on behalf of the Rio Group, said that respect for an international order based on the rule of law and international law was essential for the attainment of all the goals pursued through the United Nations. The purposes and principles of the Charter, and international law itself, were the foundations for building a better, peaceful and prosperous world. He therefore welcomed the inclusion of the item in the Committee's agenda. However, the Charter principles could not become fully effective unless all States willingly complied with their international obligations.

24. At the international level, the rule of law was closely linked to the maintenance of peace; at the national level, it implied setting legal limits to the power of the State. It should also promote social interaction between citizens and their Governments, under a legal order founded on respect for human rights. State sovereignty and the international rule of law were not incompatible. The international obligations assumed by every State were based either on treaties, by which they consented to be bound, or on obligations *erga omnes*.

25. The rule of law at the international level required effective mechanisms for the peaceful settlement of disputes arising from the application or interpretation by States of international law. In that respect the role of the International Court of Justice, in both its contentious and its advisory jurisdictions, was crucial. The United Nations should have more frequent recourse to the Court's advisory jurisdiction. New international tribunals, including the International Tribunal for the Law of the Sea and the International Criminal Court, had become necessary as a result of the evolution of international law. The extension of international jurisdiction was itself a valuable contribution to the rule of law.

26. The General Assembly, another principal organ of the United Nations, had a law-making function under Article 13 of the Charter. As for the Security Council, all Member States were bound, under Article 25 of the Charter, to accept and carry out its decisions. That being so, it was important that the Council spell out the basis and reasoning of its decisions. The Council was itself required to act in accordance not only with Article 39, but also with Articles 1 and 2. When determining the existence of any threat to the peace, breach of the peace, or act of aggression, the Council should identify the norms of international law which had been violated.

27. United Nations activities aimed at strengthening the rule of law should not focus solely on conflict and post-conflict situations. The rule of law also applied to preventive action, through technical assistance in implementing international obligations and for building capacity in crucial areas such as criminal justice, human rights and combating terrorism, organized crime, drugs and corruption. The United Nations and its Member States could play an important role in all those areas.

28. **Mr. Getahun** (Ethiopia) said his Government attached the utmost importance to ensuring the rule of law as the foundation of good governance, democracy and sustainable development in Ethiopia. The Government had taken measures to reform the administration of justice, combat corruption, reform the civil service and improve the conduct of elections. It had also promulgated a revised Penal Code consistent with its international obligations.

29. Ethiopia remained committed to the principles of international law, particularly with regard to the peaceful settlement of disputes, respect for the sovereignty and equality of States and non-interference in their internal affairs. Respect for the international rule of law could be restored only by ensuring that States were held accountable for violations. In particular, violation of the prohibition of the use or threat of force should be met with punitive measures, and mechanisms for remedying the negative consequences should be made available to victims. Respect for the rule of law was crucial to the prevention and durable resolution of conflicts. His delegation therefore

supported the active consideration by the General Assembly of the issue at hand. At the same time, the Sixth Committee should avoid unnecessary duplication of the work of the other Main Committees and other United Nations organs.

30. The Committee could help to promote the rule of law by considering a number of issues. First, it might discuss different approaches to the implementation of international law through the sharing of Member States' experiences with a view to highlighting the hurdles faced and determining possible alternative approaches or the technical assistance needed. Another possible issue for discussion was the practice of States in the peaceful settlement of disputes and respect for the principles and purposes of the United Nations in general. The Committee could also discuss the reinforcement of international law through, inter alia, enhancement of the law-making process of the General Assembly so as to ensure wider participation of Member States in the codification and progressive development of international law and consensus on issues of common concern. Such efforts could include enhancing the participation of developing countries in the work of the International Law Commission.

31. Another appropriate topic for the Committee's consideration was ways of making customary international law more accessible through codification and consolidation in texts such as the recent publication of the International Committee of the Red Cross entitled *Customary International Humanitarian Law*. The Committee could also discuss the need for capacity-building with a view to improving the dissemination of international law. Lastly, it could consider developments in regional organizations relating to the rule of law, such as the recommendations of the Non-Aligned Movement and the advances made by the African Union with regard to resisting unconstitutional changes of government and the need for intervention in cases of genocide, war crimes and crimes against humanity.

32. International law should stand firm in the face of challenges and violations. Ethiopia would participate actively in the future consideration of the topic by the Sixth Committee and hoped that specific suggestions from the Secretary-General would be forthcoming.

33. **Mr. Markiman** (Malaysia) said that inclusion of the topic of the rule of law in the agenda of the General Assembly was a timely development, as current world events demonstrated clearly the need to re-emphasize respect for the rule of law, particularly at the international level. As Mr. Hans Corell, the former Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations had stated, knowledge of international law was the best protection that mankind could create against repeating the errors of the past.

34. The first steps towards instituting the rule of law at the international level must be the codification and progressive development of international law, so that all States were aware of their international obligations. Thanks to the work of a number of international bodies, there were currently very few aspects of State and individual relations that were not covered by codified international law. However, all States should be able to participate fully in that work so that the emerging principles of international law would gain global acceptance and adherence. Developing countries and countries emerging from conflict situations should be provided with the necessary resources and technical assistance to that end.

35. The next critical step was implementation at the national level. Malaysia, for its part, did not generally ratify or accede to international treaties until it had put in place the necessary legal and administrative framework to enable it to fulfil its obligations under such treaties. In that respect, it had benefited from the legislative guides issued by relevant international bodies and from information on the legislative approaches taken by other countries. The continued elaboration of legislative guides, especially for treaties of a highly technical nature, and the creation of an easily accessible database of national implementation laws would greatly facilitate the treaty accession process for many States. The provision of technical assistance and the holding of educative seminars should also be maintained.

36. Any hesitation on the part of Malaysia to ratify or adhere to certain international instruments did not indicate lack of commitment to the instruments concerned, but rather the desire to understand fully the obligations being entered into and to ensure that they were consistent with the Constitution and with national policies, interests and sovereignty. In many cases, Malaysia was able to comply with all except a few requirements of a treaty but was unable to accede to it because no reservations to the treaty were permitted. In such cases, Malaysia took practical steps to ensure that

its domestic laws and administrative mechanisms conformed to the international norms in question, even if it could not become a party to the treaty itself. Therefore, in order to promote adherence to the rule of law, the General Assembly and other bodies should study countries' implementation of their international obligations rather than insisting on mere "paper" adherence. Moreover, treaty bodies should focus on facilitating compliance instead of finding fault in a biased manner.

37. The rule of law was essential to maintaining trust in the international legal order and friendly relations among States. If States could not trust in other States' compliance with their international legal obligations, their own compliance would seem redundant. A level playing field was crucial if the rule of law was to prevail. There must also be a system of accountability for transgressions of international law and order, incorporating the principles of separation of powers and transparency.

38. Malaysia had the deepest regard for the international judicial bodies responsible for achieving the peaceful settlement of international disputes; indeed, it had had recourse to them in recent years. However, those mechanisms should not pre-empt the use of bilateral diplomatic negotiations to resolve treaty-related or other disputes. Nor should the use of bilateral mechanisms be misconstrued as a desire to avoid impartial third-party evaluation of the disputing parties' conduct. In most cases, bilateral mechanisms were the cheaper and more practical option, and did not rule out the possibility of subsequent third-party adjudication if the need arose. However, any referrals of international or internal situations that were or could be a threat to international peace and security should be made expeditiously, so that the relevant bodies could use the ancillary powers available to them, such as the issuing of advisory opinions or the imposition of interim measures, to prevent the escalation of the dispute as well as adjudicating on the disputed issues.

39. His delegation supported the proposal in document A/61/142 that the Secretary-General should be requested to prepare a comprehensive report on the rule of law, focusing on the specific areas mentioned in the document, so as to facilitate future debate. It also supported the proposal that different sub-topics, prioritized on the basis of the current world situation, should be chosen for the purpose of annual deliberations. The structure of the report should follow the approach taken by the International Law Commission. It was to be hoped that all decisions in that regard would be made in full consultation with Member States.

40. **Mr. Tajima** (Japan) said that Japan attached great importance to safeguarding the rule of law at the national and international levels. It appreciated the Committee's work on codification, incorporating the input of the International Law Commission, and looked forward to further consideration of the issues currently being addressed by the Commission, including the issue of shared natural resources. In the future, it might be useful to refer to the Commission's work concerning the relationships among international norms that had developed as different areas of international law, such as the relationship between humanitarian law and human rights law.

41. When incorporating international law into domestic law, Japan gave thorough consideration to the obligations into which it was entering. If existing domestic law did not fulfil those obligations, new laws were enacted. Japan also assisted other countries, particularly the members of the Association of Southeast Asian Nations, with capacity-building in relation to the rule of law, for example, by organizing seminars to promote accession to the international conventions on terrorism. Discussions under the current agenda item would allow such national and regional experiences to be shared at the international level. It might be worthwhile to identify the practical difficulties faced by Member States in applying international law within their domestic law and to request relevant legal advice on a collective basis from the Office of Legal Affairs.

42. The peaceful settlement of disputes constituted the foundation of international peace and security. In that context, Japan commended the work of the International Court of Justice and the International Tribunal for the Law of the Sea and encouraged them to pursue further interaction with States, such as the recent meetings held between their Presidents and members of the Committee. It was to be hoped that Member States would make the best possible use of both bodies, including by requesting advisory opinions through international organizations.

43. It would be premature to say that Member States fully embraced the goals to be achieved under the

current agenda item. His delegation would therefore be following the debate with great interest.

44. **Mr. Duan** Jielong (China) said that strengthening the rule of law would help to maintain peace, promote development and enhance cooperation. The achievements of the various organs of the United Nations system in the development, codification, clarification and enforcement of the rule of law at the international level were considerable.

45. His Government attached great importance to the rule of international law and had a record of putting it into practice. In the 1950s, China, India and Myanmar had advocated the Five Principles of Peaceful Coexistence, which had since gained general acceptance around the world and had become guiding principles for relations between States. In the current international situation, his Government aimed to build a harmonious world by upholding democracy and equality in order to achieve coordination and cooperation, upholding harmony and mutual trust in order to realize common security, upholding fairness and mutual benefit in order to achieve common development, and upholding tolerance and openness in order to promote dialogue among civilizations.

46. His Government adhered to the principles of international law, including the Charter of the United Nations and the international treaties to which it was a party. China had also gradually increased its participation in the formulation of international treaties in various fields. It had acceded to more than 300 multilateral treaties and signed more than 17,000 bilateral treaties and other international instruments.

47. His Government had always favoured the settlement of international disputes by peaceful means. It had resolved the issues of the Hong Kong and Macao Special Administrative Regions through diplomatic negotiations with the Governments of the United Kingdom and Portugal respectively, thus setting an example for the peaceful resolution of situations inherited from the past.

48. China supported the strengthening of cooperation to punish the most serious international crimes. It had participated in the work of the International Military Tribunal for the Far East after the Second World War and had supported the establishment of the International Criminal Tribunals for Rwanda and the Former Yugoslavia. It had also supported the establishment of the International Criminal Court and had played an active role in the negotiations on its Statute.

49. In order to strengthen the rule of law at the international level, it was important not only to formulate provisions of international law, but also to implement them. First, the authority of the Charter of the United Nations, whose purposes and principles were recognized as mandatory legal norms, must be maintained. Second, the rule of law at the international level required that international matters should be addressed jointly, through negotiations in which countries participated on an equal footing. Third, international treaties, principles of customary international law and the binding decisions of the Security Council should be strictly adhered to by all countries. No country was above international law nor had the right to apply it selectively. Fourth, given the increasing number of international judicial organs, efforts were required in order to ensure the uniform application of international law and to reduce the negative impact of the fragmentation of international law while ensuring that those organs fulfilled their functions properly. Fifth, international legislation should be further enhanced, particularly the international legal regimes for nuclear non-proliferation and the prevention of the weaponization of outer space.

50. The rule of law also played an important role in conflict prevention and post-conflict social reconstruction. A number of principles should be observed when helping countries to develop the rule of law at the national level. First, the development of the rule of law in a given country was by nature a sovereign matter. National sovereignty should therefore be fully respected and there should be no interference in a country's internal affairs without its consent. Assistance should be of a financial and technical nature, focusing on capacity-building, since a country's capacity to strengthen the rule of law hinged on its stability and level of economic and social development. Second, assistance to other countries in developing the rule of law should be provided within the framework and under the leadership of the United Nations. Third, the rule of law at the national level should be developed on the basis of the particular situation of the country in question, taking into account its political system and historical and cultural traditions. Strengthening the rule of law in order to promote peace, development and cooperation was the

common responsibility of all States. China stood ready to contribute to international efforts to that end.

51. **Ms. Ramos Rodríguez** (Cuba) reaffirmed her delegation's faith in multilateralism and its commitment to the purposes and principles of the United Nations Charter and to international law. Her country was concerned about the Security Council's increasing tendency to interfere in matters that fell within the competence of the General Assembly, as stipulated in Article 13 of the Charter. The General Assembly was the main deliberative, policymaking and representative organ of the United Nations and played a role in standard-setting and the codification of international law, as had been reaffirmed in the 2005 World Summit Outcome. It was even competent to deal with questions relating to international peace and security, as provided in Articles 10 to 14 and 35 of the Charter and rules 7 to 10 of its rules of procedure and as had, indeed, been recognized on several occasions by the International Court of Justice. While such questions were the primary responsibility of the Security Council, they were not its exclusive responsibility. The proper balance between the principal organs of the United Nations should be maintained, in accordance with the Charter.

52. At the international level, the rule of law was expressed through respect for international law, including the Charter, and was endangered by the existence of double standards, the unilateral exercise of criminal and civil jurisdiction outside national courts and non-compliance with the obligations laid down in international agreements. Only if the rules of international law were respected by all States, large and small, would it be possible to establish a just and lasting peace in the world, in accordance with the purposes and principles of the Charter of the United Nations.

53. **Mr. Kanu** (Sierra Leone) said that his delegation had been calling for the inclusion of an item on "the rule of law principles in international law" in the agenda of the International Law Commission, and it therefore welcomed the Sixth Committee's consideration of the rule of law at the national and international levels. Sierra Leone attached great importance to the rule of law, the breakdown of which had caused a decade of civil war in his country. That breakdown had been due to a corrupt body politic that had been inept in all aspects of good governance, hence the request made in June 2000 by President Alhaji Ahmad Tejan Kabbah for the establishment of the Special Court for Sierra Leone. The restoration of the rule of law was essential for the sustainable resolution of conflict and the rebuilding of a just society.

54. The Security Council was the principal organ responsible for the maintenance of international peace and security, and that role was intrinsically linked to the promotion of international law and the rule of law in international relations. The Council had been very proactive in enhancing that role, most recently by establishing ad hoc tribunals to address impunity. Those tribunals had sent a clear message to those most responsible for heinous crimes that offended the conscience of mankind that they could run but they could not hide.

55. However, strengthening international law and the rule of law was not the exclusive domain of the Security Council. The current debate in the Sixth Committee gave credence to the view that the General Assembly also had a significant role to play in that regard. Indeed, the corpus of *opinio juris sive necessitatis* of the Assembly had played an important role in strengthening the rule of law and contributing to the progressive development of international law. In addition, the world now had a permanent international criminal court that would contribute significantly to the promotion of international law, the rule of law and justice. Universal acceptance of its Statute was therefore imperative.

56. The experience of Sierra Leone and other countries emerging from conflict indicated clearly that there was a gap in the international community's capacity to respond promptly to impunity. The "Justice Rapid Response" mechanism — an initiative launched by Germany and supported by like-minded States, including his own — could help to fill that gap and improve the international community's ability to demand accountability for genocide, war crimes and crimes against humanity and to ensure that international law, the rule of law and justice played an integral part in post-conflict peacebuilding. Nevertheless, much remained to be done at the international level to further the rule of law in international relations. All Member States must respect the Charter of the United Nations and the international conventions to which they were parties. The members of the Security Council, which was the custodian and embodiment of the rule of law in international

relations, should set the example of how the rule of law was to be maintained at the international level.

57. **Mr. Chidyausiku** (Zimbabwe) said the rule of law was the bedrock of all democratic legal systems. His own country respected and upheld the rule of law, which protected the constitutional rights of its citizens. He welcomed the increased focus on the international rule of law, as a means of achieving a just and equitable international legal order. The presumption of innocence, which was the basic tenet of criminal justice, should be applied at both the national and international levels. His delegation therefore condemned as unlawful the continued detention without charge of prisoners at Guantánamo Bay. He endorsed the request to the Secretary-General for detailed regular reports on the question of the rule of law at both the national and international levels.

58. **Mr. Charles** (Trinidad and Tobago) welcomed the inclusion of the item under consideration in the agenda of the current session of the General Assembly for it was a tangible response to the call at the 2005 World Summit for efforts to ensure universal adherence to and implementation of the rule of law at the national and international levels. It was indeed incumbent on the international community to strengthen the rule of law both nationally and internationally, since it could be argued that its erosion or collapse was at the basis of existing conflicts within and between nations. It was a pillar of his country's democracy: the Constitution of Trinidad and Tobago, supplemented by other laws and United Nations instruments, guaranteed fundamental rights and freedoms for all under the control of an independent judiciary. The rule of law also safeguarded his country's vital interests: a rule-based international system helped to protect its borders against the drug trade and ensured the defence of its sovereignty, territorial integrity and independence.

59. Trinidad and Tobago recognized the importance of discharging its international legal obligations, whether under treaties or customary international law, and was mindful of the need to incorporate them into its domestic law as appropriate. It accordingly encouraged its nationals, particularly lawyers and judges, to benefit from capacity-building and training provided by various United Nations system bodies, so as to enable them to interpret and apply international treaties at a time of increasing recourse to globalized rules. Trinidad and Tobago subscribed to the principle of the pacific settlement of disputes and urged all States to do likewise, in accordance with Article 33 of the Charter of the United Nations; it had witnessed at first hand the benefits that accrued therefrom. As one of the earliest advocates of the establishment of the International Criminal Court, it was particularly concerned about cases of impunity; he accordingly welcomed the entry into force of the Rome Statute, since it would ensure the prosecution of the perpetrators of criminal acts without exception. He concluded by calling for increased contributions to the Trust Fund set up by the Secretary-General to assist States in the settlement of disputes through the International Court of Justice, as a means of strengthening the rule of law in international affairs.

60. **Mr. Maqungo** (South Africa), referring to the proposal that a sub-topic should be chosen each year to which the Committee and the Secretary-General's report could devote particular attention suggested that the category of treaties selected for the annual treaty event should be linked to that sub-topic. That would contribute to increased ratification of international treaties and provide the occasion for a general debate during which States could be encouraged to report on their own experience in that regard. While the Sixth Committee's agenda had tended in the past to focus on the security aspects of international law, its developmental and socio-economic aspects were an important pillar of peace and security and, in addition, offered a link with the theme of the current session of the General Assembly. It would also be useful if the Secretariat could identify areas in the 2005 World Summit Outcome that lent themselves to follow-up action, particularly by the Sixth Committee, in the context of promoting the rule of law.

61. The question of the rule of law at the international level could not be reduced to the adoption or ratification of international instruments but should also include action to entrench the legitimacy of international law. The latter was closely linked to promotion of the rule of law and in that connection the Sixth Committee might wish to consider the implications of the latter with regard to the principle of the sovereign equality of States. In particular, the Committee might consider the extent to which international law was respected equally by all States and the impact of power on the equal application of international law. Another aspect of the legitimacy of international law concerned the binding nature of decisions taken by the Security Council under Chapter VII of the Charter, which made it necessary for

the Council to pay due attention to the rule of law and the constraints of international law. There was a need to examine the limits of the powers vested in the Council under Chapter VII and more particularly the question on whether the Council had absolute discretion to determine the existence of a threat to peace under Article 39 or to take measures under Articles 40, 41 and 42. That would require consideration of the relationship between various United Nations organs, in particular the General Assembly, the Security Council and the International Court of Justice.

62. **Ms. Malecela** (United Republic of Tanzania) said that, as a country committed to upholding the rule of law, the United Republic of Tanzania supported the work of all the United Nations judicial bodies that were working to end impunity for all those accused of genocide, war crimes, crimes against humanity and ethnic cleansing. It had ratified most of the core human rights instruments and accordingly played a significant role in promoting and protecting human rights at the national, regional and international levels. It had always observed the principles of non-use of force and the sovereignty, equality and rights to self-determination and integrity of all States. It recognized the 2005 World Summit Outcome as a landmark achievement in the development of the rule of law that could, if its goals were fulfilled, result in economic growth, poverty eradication and the elimination of hunger. In recent years there had been serious violations of basic human rights in many parts of the world; such situations needed to be addressed without delay in accordance with international law. If political considerations prevented the Security Council from taking the necessary steps, the international community must be prepared to act on the basis of consensus. She urged all Member States to adhere to the Geneva Conventions and their Additional Protocols, which offered an interface between international humanitarian law and international human rights law, and to implement the 2005 World Summit Outcome, thereby serving the ends of international peace, security and development and bringing out the true meaning of the rule of law.

63. **Ms. Kaewpanya** (Thailand) said that the rule of law was a timely topic for consideration because it was crucial at both the national and the international levels. At the national level, it should be developed in the light of each country's circumstances, particularly in post-conflict situations. At the international level, it was essential for international peace and security; it depended on the discharge by States of their international treaty obligations, in accordance with the principle of *pacta sunt servanda*, and both facilitated and was promoted by the development of domestic legislation. Her delegation accordingly appreciated the consistent contribution made by the specialized bodies of the United Nations to the progressive development of international law and jurisprudence and encouraged all Member States to accede to all international conventions, both within and outside the United Nations system, especially those that codified customary international law. Her delegation supported the proposal to organize an annual treaty event on the occasion of the general debate in the General Assembly, as that would encourage Member States to become parties to existing international instruments, and was in favour of periodic briefings and seminars organized by the Office of Legal Affairs to enhance understanding of, and promote compliance with, international law.

64. With regard to the future of the item, it might be useful to discuss the possibility of preparing a legislative guide that would help States parties to implement their treaty obligations. Capacity-building was a crucial factor in that regard, particularly for developing countries, and likewise deserved attention; it could be extended to encompass the reinforcement of public awareness at the national level, with a view to creating support for required changes in domestic laws, training of government officials, lawmakers, lawyers and others. The discussion should be framed thematically and timed to coincide with the treaty event or to respond to the current global situation and should not duplicate the work of other United Nations bodies.

65. **Mr. You** Ki-jun (Republic of Korea) welcomed the General Assembly's consideration of the rule of law at the national and international levels and expressed thanks to Liechtenstein and Mexico for proposing the inclusion of the item in the agenda of the current session. The rule of law meant that that governmental authority could be legitimately exercised only in accordance with written, publicly disclosed laws, adopted and enforced in accordance with established procedures decided by the Government. It was intended to be a safeguard against arbitrary governance, at least in its national dimension.

66. The international and national dimensions of the rule of law were closely interlinked. However, the concept of the rule of law per se said nothing about the justness of the laws themselves; it related simply to how the legal system upheld the law. The Assembly's discussion of the rule of law at the national and international levels should therefore not be equated with a discussion of whether a particular legal system was right or wrong. The international legal order should serve as a framework for peaceful relations and as a source of rights and obligations for States, not generate more disputes among nations. International legal standards — in particular article 34 of the Vienna Convention on the Law of Treaties, which established that a treaty did not create either obligations or rights for a third State without its consent — should be followed.

67. Strengthening the rule of law at the international level could have a direct impact on, but could not guarantee, the rule of law at the national level. Strengthening the rule of law might mean ensuring compliance with decisions of international judicial bodies. But everyone was aware that, when the stakes were very high, States might behave in certain ways that clearly challenged the legal requirements laid down in the Charter of the United Nations. It also had to be recognized that there was no clear rule as to which mode of dispute settlement was preferred among those provided for in Article 33 of the Charter.

68. In recent years, the United Nations had greatly improved its mechanisms for strengthening the rule of law at the national level, particularly in post-conflict situations. At the international level, however, a considerable gap remained. While the General Assembly had contributed a great deal, in particular through the work of the Sixth Committee, its efforts to develop and codify international law in a number of specific areas were not being carried out within a coherent global framework for the rule of law. As the chief deliberative, policymaking and representative organ of the United Nations, the Assembly was uniquely positioned to fill that gap and to promote universal adherence to the concept of the rule of law, especially at the international level.

69. He agreed that the General Assembly's discussion of the item in 2007 should ideally be based on a comprehensive report by the Secretary-General, and, in principle, he had no objection to the establishment of the proposed rule of law assistance unit within the Secretariat.

70. **Ms. Kaplan** (Israel) said that there was need to develop and promote the rule of law at all levels because it was a crucial element of democratic society. The 1948 Declaration of Independence of the State of Israel had rested on strict adherence to the rule of law. Although Israel did not yet have an official constitution, basic laws and judicial rulings protected a number of crucial human rights from any unjustified infringement by governmental authorities.

71. Democracy could prevail only when all persons, institutions and public and private entities, including the State itself, submitted to the rule of law. Moreover, promoting the rule of law at the national level was an essential precondition for strengthening the international legal order.

72. Since the rule of law was fundamental to conflict resolution and nation-building the international community ought to join forces in securing the rule of law in young developing democratic countries. Moreover, the rule of law offered a basis for dialogue between States and nations. Israel was pleased to have engaged in legal dialogues with other States and to have been invited to provide assistance and training for countries seeking to establish legal systems or enhance the rule of law.

73. International cooperation aimed at promoting the pre-eminence of the rule of law at the international and national levels would greatly improve international relations, the stability of emerging democracies and the application of internationally recognized human rights.

74. **Mr. Anwar** (India) said that the rule of law was often advanced as a solution to the abuse of government power, economic stagnation and corruption. It was considered essential to the promotion of democracy, human rights, free and fair markets and to the battle against international crime and terrorism. It was also seen as an indispensable component for promoting peace in post-conflict societies. The rule of law might therefore have a different meaning and content depending on the objective assigned to it.

75. At the national level, in democratic societies, the rule of law was meant as strict adherence to a set of specific rules enforced by an independent judiciary. Those rules had to guarantee due process and conform

to a higher set of norms predicated on international treaties or the principles of natural justice.

76. In the international context, supranational institutions set up to promote the rule of law must themselves comply with the standards of democratic accountability which were in turn a prerequisite of the rule of law. That meant that the development of international law was a function of the General Assembly and not the Security Council.

77. As far as the honouring of obligations under international conventions was concerned, a country would derive optimal benefits from the use of a particular regulatory regime only if the appropriate implementing legislation existed at the national level. The rule of law therefore helped to strengthen the linkage between municipal and international law and to promote international law.

78. The setting up of a unit with a broad mandate to provide assistance in regard to the rule of law would be useful. The dissemination of regular information about the action taken by the General Assembly and other international organizations would help to identify and evaluate new trends in international law, since "soft law", in the form of guidelines, recommendations and other non-binding texts, often played a significant role in the development of contemporary international law and endeavours to amend it.

79. The provision of information concerning treaties concluded in the context of the law of the sea would also be beneficial, because many United Nations agencies and other international and regional organizations had a mandate wholly or partly related to the law of the sea. Such a dispersal of authority led to overlapping competence and hampered cooperation and coordination. All those bodies had a plethora of hard-law and soft-law instruments covering a broad range of issues connected with the law of the sea. It would clearly be advantageous to receive information on that subject from just one source.

80. A rule of law unit would have crucial functions with regard to the provision of technical assistance, but they should not replicate those already being performed by other specialized agencies and United Nations bodies, virtually all of which ran technical assistance programmes to support Governments in their implementation and interpretation of conventions. Nevertheless, no arrangements existed for the institutional dissemination of information about the activities of the International Court of Justice or the International Law Commission or for the examination of the impact of those activities on the development of international law. That was a gap that a rule of law unit could fill.

81. **Mr. Popkov** (Belarus) said that the rule of law was a goal to which the international community had long aspired. It had taken firmer shape with the framing of the Charter of the United Nations and with it, of the principles forming the basis of modern international law. Over the course of time, those principles had proved to be the criteria of legality in international relations. The problems evoked by those who argued in favour of updating the Charter principles in the light of modern developments stemmed not from the principles themselves, but from the absence of political will to deal with difficult situations within the limits set by international law. Certainly, that law could not be static; it had to adapt to changing situations, but the process of adaptation should be gradual and in accordance with the generally accepted rules for the framing of international legal norms. For his delegation, the rule of law meant consolidating the fundamentals of international law through the codification and progressive development of international legal rules. Since the Sixth Committee and the International Law Commission made such an important contribution in that respect, it was regrettable that the Committee was unable to reach a consensus on the adoption of a number of significant texts developed by the Commission to strengthen the rule of law, such as the articles on responsibility of States for internationally wrongful acts.

82. The advisory jurisdiction of the International Court of Justice was underused. Increasing the Court's advisory role would result in the adoption of sounder decisions, in an international legal sense, by the principal organs and agencies of the United Nations system. The use of unclear or ambiguous language in international legal instruments should be avoided. Contradictory wording tended to result in outcomes which defeated the object of the law for the sake of convenient political solutions.

83. Discussion of the rule of law within the Sixth Committee should be confined to the international legal aspects of the question, to avoid trespassing in the areas of competence of other United Nations organs. The question of assistance to States in post-conflict situations should be left to the Peacebuilding

Commission and the United Nations development agencies. The question of legal assistance from the Secretariat in bringing about the rule of law at the national level could be confined to assistance in implementing key international treaties adopted under the auspices of the United Nations. That task called for cooperation with other United Nations organs, programmes and funds, and with international financial institutions. The Secretariat could also do much to disseminate knowledge of international law, and thus to strengthen the rule of law, by means of seminars, conferences and similar educational projects.

84. His delegation wished to propose for consideration by the Committee the convening of a congress on international law or on the problem of the rule of law, at which scholars and international law practitioners would discuss the most pressing problems of international law and the prospects for solving them. An event of that nature had already been organized within the United Nations during the Decade for International Law.

85. **Mr. Lamine** (Algeria) said that his Government attached great importance to respect for the rule of law. The latter was not, however, confined to the adoption of conventions and recommendations; it also meant ensuring the legality of those instruments and compliance with them.

86. Socio-economic development was closely associated with the development of the rule of law. The General Assembly had a leading role to play in encouraging and coordinating efforts to that end. The international community should not, however, take the place of local authorities in instituting the rule of law, but should provide them with the requisite support for their endeavours in that respect.

87. Respecting the rules of international law and making sure that the decisions of international courts were enforced would help to inculcate a rule of law culture. Unfortunately strategic and geopolitical stakes often prompted some international actors to depart from the objective, accepted interpretation of established international standards.

88. International conventions on international terrorism had introduced the obligation to extradite or prosecute with a view to ending abuses of the right of asylum and bringing persons implicated in acts of terrorism to trial. He therefore hailed the fact that the International Law Commission had started to examine, develop and codify the principle of *aut dedere aut judicare* in order to end the impunity of terrorists.

89. The International Court of Justice played a vital role in bolstering the rule of law. Member States should be encouraged to turn to the Court in order to settle their differences peaceably and avoid the use of force. The numerous decisions issued by the Court since its foundation had in fact done much to consolidate the rule of law.

90. The delimitation of the powers of the General Assembly and the Security Council was an issue which should be discussed in the context of the rule of law, since the continual erosion of the Assembly's prerogatives had been reflected in the Security Council's increasingly frequent recourse to thematic resolutions which were inconsistent with the Council's chief prerogative as set forth in the Charter of the United Nations. If the Council were to abide by its mandate, that would enhance good governance at the international level and set a good example.

91. It would be impossible to restore the rule of law at the national level so long as dangerously aberrant behaviour jeopardized the most fundamental legal principles, including those relating to human rights and international humanitarian law. The silence in which the international community had witnessed the tragedy experienced by the Lebanese and Palestinian peoples revealed the precarious nature, if not to say the absence, of the rule of law at the international level and a strangely selective perception of respect for human rights.

92. **Mr. Kuzmin** (Russian Federation) said that, no matter how States' views on the notion of the rule of law might differ, it should be possible to agree that the might is right approach to international relations must be replaced by the force of law. The founders of the United Nations had been striving to realize that very principle when they adopted the Charter of the United Nations and the 2005 World Summit Outcome had acknowledged its importance for peaceful coexistence and cooperation between States.

93. What did strict adherence to the rule of law entail? It was no secret that what was needed, first and foremost, was political will on the part of States to accept and honour obligations. Much could be done to influence that will if the General Assembly were to concentrate on perfecting the processes of standard-

setting and the application of the norms of international law.

94. As a first stage in the consideration of the topic, the Secretariat could be requested to conduct a review of existing General Assembly mechanisms in that sphere in order to propose ways of improving them. The General Assembly and the Sixth Committee made a substantial contribution to the codification and progressive development of international law. Conventions had been drawn up and adopted on the basis of drafts prepared by the International Law Commission and the United Nations Commission on International Trade Law. Many of those conventions had laid the foundations of current international law and had helped to stabilize and ensure the predictability of international relations in a variety of domains, which meant that they had promoted the establishment of the rule of law.

95. The current trend was, however, against the formulation of conventions and other legally binding texts resting on drafts presented by the International Law Commission. Perhaps that tendency had been related to the specific nature of the topics considered by the Commission in recent years. It would be useful to ponder the means of increasing cooperation between the International Law Commission and the General Assembly. It might likewise be possible to ask the expert organs he had mentioned to consider ways of enhancing their contribution to the development of international law.

96. Improving the implementation of international legal standards offered plenty of scope for action. The efforts deployed by the Secretariat, in its capacity of depositary of international treaties, to boost the number of parties to them were commendable. Nevertheless, accession to international treaties was a sovereign right of States and the Organization could only urge them to become a party to such instruments. But quality must not be forgotten in the pursuit of more parties to treaties. Formal accession in itself was not enough; a State must conscientiously fulfil its treaty obligations. Many States were struggling to pass the appropriate implementing legislation. Several United Nations bodies were engaged in the drafting of model laws, or were providing States with technical assistance in the drafting of the relevant national legislation, but such activities were confined to a limited number of fields. The expansion of such activities in cooperation with other organizations should therefore be considered.

97. Another important element of the fulfilling of obligations was their subsequent coherent application. In recent decades, the ambit of international law had broadened substantially. The fairly independent fashion in which many of its branches were developing could lead to a conflict between the various obligations accepted by States. For that reason, the International Law Commission's examination of the fragmentation of international law was most useful and its findings should be studied when the Committee deliberated the rule of law.

98. Furthermore, the Committee should give some thought to the formulation of appropriate rules of responsibility in order to prevent the violation of international obligations. As part of efforts to strengthen the principle of the rule of law, the Committee would be well advised to take another look at the articles on the responsibility of States for internationally wrongful acts and to consider the preparation of an international convention based on those articles.

99. It was hard to draw a precise line between the rule of law at the national and international levels. If it were possible to achieve progress in the conscientious fulfilment of international obligations that would have a spin-off at the national level. Special attention should be paid to conflict and post-conflict situations, since the international community had been fairly active, but not always successful, in that sphere over the previous ten years. The models applied to societies in conflict had often been imported wholesale and had not been adapted to the specific needs and characteristics of countries and regions. The tribunals established to punish those guilty for igniting the conflicts had not maintained consistently high standards of impartiality, had been far from the country in question and had not promoted the restoration of national judicial systems.

100. It was necessary to learn from those lessons and to correct the line taken by the international community. In that connection, it might be wise to consider the possible role of a rule of law division responding to an intergovernmental organ, the Sixth Committee or the Peacebuilding Commission.

Agenda item 100: Measures to eliminate international terrorism (*continued*) (A/61/37, A/61/178, A/61/210 and Add.1, and A/61/280)

101. **The Chairman** said that several delegations had expressed an interest in establishing a working group to continue the work of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996. He therefore took it that it was the general wish of the Committee to do so.

102. *It was so decided.*

103. **The Chairman** said that the Chairman of the Ad Hoc Committee, Mr. Perera (Sri Lanka), was available to serve as chairman of the working group. He took it that the Committee wished to elect him to that office.

104. *It was so decided.*

105. **The Chairman** said it was his understanding that the working group would continue to carry out the mandate of the Ad Hoc Committee as contained in paragraph 21 of General Assembly resolution 60/43 of 8 December 2005. The working group would focus mainly on a briefing by the chairman on his bilateral contacts with delegations on the draft comprehensive convention on international terrorism and on the convening of a high-level conference. Pursuant to paragraph 9 of General Assembly resolution 51/210, the Ad Hoc Committee was open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency. He took it that the Committee wished that formula to be applied to the working group.

106. *It was so decided.*

The meeting rose at 1.10 p.m.

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Chairman: Mr. Gómez Robledo.. (Mexico)

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The meeting was called to order at 10 a.m.

Agenda item 76: Consideration of effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives (A/61/119 and Add.1 and 2)

1. **Ms. Skaare** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the topic under consideration was a source of great concern. Preserving the safety of foreign emissaries was one of the principles deemed essential for the conduct of foreign relations and the promotion of interests common to the international community as a whole. Rules on the subject had appeared in the legal systems of all cultures, because international cooperation depended upon the protection of States representatives.

2. According to the universally accepted principles and rules of international law embodied in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, receiving States were obliged to protect the premises and staff of diplomatic and consular missions and the missions of international organizations. Respect for the provisions of international law governing diplomatic and consular relations was a basic prerequisite for the normal conduct of relations among States and for the fulfilment of the purposes and principles of the Charter of the United Nations.

3. The fundamental reason for ensuring the security of diplomatic and consular missions and representatives was to safeguard not particular individuals, but the channels of communication between States. While sending States were entitled to the best possible protection of their representatives, the latter had a duty to comply with the laws and regulations of the receiving State.

4. Acts of violence against diplomatic and consular representatives and representatives of international intergovernmental organizations were unjustifiable and deserved strong condemnation. Her own country's missions had been affected by recent incidents which had seriously impeded their work. It was also alarming that, in recent years, innocent lives had been endangered or lost in such incidents. There was therefore a need for close cooperation between sending and receiving States in order to prevent breaches of the security of diplomatic and consular missions.

5. Receiving States had a particular duty to ensure appropriate protection of diplomatic and consular missions if a political situation made such action necessary. If the receiving State failed to do so, under the Vienna Conventions the injured State was entitled to claim prompt compensation for losses or injuries suffered as a result of inadequate security arrangements. She urged all States which had not yet done so to become parties to the relevant international legal instruments. Moreover, as the reporting procedures introduced by General Assembly resolution 59/37 would raise the world community's awareness of violations of the Vienna Conventions and hence of the need to promote efforts to enhance the protection, security and safety of diplomatic and consular missions and representatives, she appealed to all States to comply with those procedures. Lastly, she thanked the Secretary-General for his efforts to bring about the effective implementation of that resolution.

6. **Ms. Sotaniemi** (Finland), speaking on behalf of the European Union; the acceding countries Bulgaria and Romania; the candidate countries Croatia, the former Yugoslav Republic of Macedonia and Turkey; the stabilization and association process countries Albania, Bosnia and Herzegovina, Montenegro and Serbia; and, in addition, Moldova and Ukraine, said that the norms of international law as codified in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations laid down the legal basis for relations between States. They regulated not only the privileges and immunities of diplomatic and consular representatives, but also the obligations of receiving States. The rising number of ratifications of the Conventions and their protocols was therefore a matter of satisfaction. Member States should implement those texts fully and honour their obligations under them.

7. The purpose of the privileges and immunities guaranteed by the Conventions was not to safeguard individuals but to protect the sending State and to make sure that diplomatic and consular missions could efficiently perform their functions as representatives of States. Diplomatic and consular staff were naturally under an obligation to respect the laws of the receiving State.

8. The responsibility of a receiving State to ensure the security of the diplomatic and consular missions in its territory was central to international law on diplomatic relations. The physical safety of diplomatic

and consular personnel, which was a prerequisite for the smooth functioning of missions, was in the common interest of the international community and must therefore be safeguarded.

9. The European Union was deeply concerned about and condemned the continued, unacceptable and totally unjustifiable attacks which had been deliberately directed against diplomatic and consular missions and their staff and about other violations of the Vienna Conventions around the world. It therefore strongly urged Member States to meet their obligations under international law, to provide foreign missions with protection and to do their utmost to avert such attacks. If the latter did occur, they must be fully investigated and the perpetrators must be prosecuted. Member States should further engage in a dialogue with the diplomatic missions in their territory with a view to finding the most effective ways of guaranteeing the full protection of diplomatic premises and representatives. Failure by a State to meet its obligations under the Vienna Conventions clearly engaged its international responsibility and entailed an obligation to make reparation or to take other remedial action. The European Union encouraged Member States to comply with the reporting procedures established in General Assembly resolution 59/37 with a view to preventing attacks against diplomatic and consular missions and their representatives in the future.

10. **Mr. Adsett** (Canada), speaking on behalf of the CANZ group (Australia, Canada and New Zealand), referred to the death of a senior Canadian diplomat, Mr. Glynn Berry, at the hands of a suicide bomber in Afghanistan and said that attacks on diplomatic personnel were universally acknowledged to be a serious international crime. They were particularly heinous and senseless when they targeted persons who were dedicated to improving the lives of the population of the country in which they were serving.

11. Diplomats were often in the front line of the struggle to help the most vulnerable and dispossessed people on the planet. They often worked in very dangerous conditions in conflict zones. Traditional measures to protect them were not enough. Ratification of the relevant treaties and the criminalization of offences against diplomatic and consular personnel were needed. Prosecution of offenders was absolutely essential. If diplomats were to be able to carry out their work, it was vital to ensure that the latter was better understood and appreciated by the local population, especially in crisis and conflict zones.

12. Although there had been unrestrained attacks on diplomatic missions during the previous year, in one commendable instance local security forces had prevented greater harm. Diplomatic premises could not be made the convenient lightening rod for political dissatisfaction. He therefore called upon host States to be vigilant and active in their defence and rigorous in the prosecution of offenders. The principle of friendly relations between States required no less.

13. **Mr. Abdul Rahim** (Malaysia) said he wished to place on record his Government's appreciation of the way in which the Secretary-General and the Secretariat had fulfilled their mandate under General Assembly resolution 59/37 and said that the reporting procedures instituted under that resolution had provided a realistic picture of the challenges faced by those who served in the field and by national authorities whose responsibility it was to honour States' obligations under the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

14. If representatives of sovereign States and recognized international legal bodies were to go about their business of furthering international friendly relations and the maintenance of international peace and security without fear, States must guarantee the protection, security and safety of those persons.

15. Clearly there was almost universal adherence to the United Nations conventions which served as the international legal framework for the protection of diplomatic and consular missions and the offices of international organizations. The relatively few reports of serious violations of those instruments augured well and indicated that States were generally fulfilling their duties and responsibilities in that respect. Nevertheless, continuing acts of violence against diplomatic and consular missions and the offices of international organizations were a matter of concern, since those premises were generally easy targets because they had to be easily accessible to the public if they were to perform their functions in the host country.

16. Malaysia supported any measure which would enhance their protection and welcomed the constructive suggestions of Qatar, Finland and Ecuador

in that regard. Reciprocity would certainly help to ensure that adequate protective measures were put in place and that a timely and effective response would be given to any serious violations of protective obligations. His Government had already enacted legislation to give effect to the relevant provisions of the three conventions he had mentioned earlier, because it took its responsibilities in that connection seriously. Security arrangements were geared to the level of the perceived threat and prompt action was taken on any reported incidents or violations of the law. Malaysia undertook to work with other States parties to achieve the more effective implementation of the three conventions in question.

17. **Ms. Kaplan** (Israel) said that violent attacks and terrorist threats against diplomatic and consular missions and representatives and the offices and staff of international intergovernmental organizations were rapidly increasing. The missions and representatives of her country had suffered as a result of that development. The international community should therefore take swift action to provide adequate protection for all diplomatic missions and staff, especially when they were targeted by terrorists aiming to destabilize relations between friendly States.

18. Reiterating her Government's commitment to the provisions of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and all other relevant international legal instruments affording protection to diplomatic and consular staff and missions, she said that the Committee must draw greater attention to the obligations arising out of article 22, paragraph 2, of the 1961 Vienna Convention. The special duty of care it imposed was of great relevance when diplomatic missions were confronted with mass demonstrations. Without proper local protection, missions would be unable to perform their diplomatic and consular functions. At the same time, irrespective of the privileges and immunities diplomatic and consular staff might enjoy, it was their duty to respect the laws and regulations of the receiving State. The international community should do all it could to make sure that receiving States fulfilled their obligations under international law in order to promote an environment in which diplomatic representatives could carry out their essential duties without risking their lives.

19. **Ms. Ramos Rodríguez** (Cuba) said that breaches of the security of diplomatic and consular missions were a worrying phenomenon causing damage to property and endangering the lives of innocent people. Her delegation unreservedly condemned such acts whose perpetrators should not go unpunished. For that reason, States must take the requisite steps to fulfil their international obligations and to prohibit the activities of persons, groups and organizations which incited, organized or committed acts against the security of missions and the safety of diplomatic and consular staff in their territory.

20. From time immemorial, diplomatic and consular staff had enjoyed privileges and immunities designed to protect them. The authorities of her country had adopted measures to prevent any acts of violence against foreign missions in its national territory. Missions and premises where official activities took place and the homes of diplomatic representatives were guarded by members of the public security services.

21. Cuban legislation had criminalized acts, aggression and attacks against the honour and dignity of the diplomatic representatives of foreign States and perpetrators of such deeds were liable to heavy prison sentences. International conventions on the protection and security of diplomatic and consular missions must be strictly respected; while it was satisfying to note that 26 more States had become parties to the instruments in question since the previous report (A/59/125) had been issued, the topic was still of great interest and its consideration would help to promote compliance with the law on diplomatic and consular relations.

22. **Mr. Kuzmin** (Russian Federation) said there were still a substantial number of hot spots in the world, and armed conflicts were in progress in many places. Diplomats worked in almost all of the countries concerned and deserved to receive the requisite level of protection from the international community.

23. In 2006, five members of the Russian embassy staff had been brutally killed in Baghdad after an armed terrorist attack on their car. Those guilty of the attack were still at large. His Government therefore urged States to comply fully with the principles and rules of international law on the protection of diplomatic personnel, including during armed conflicts of an international and non-international nature. In addition to the appalling event he had just described, over the previous two years Russian diplomats had

repeatedly been exposed to violence in perfectly safe countries.

24. The General Assembly's resolution under the current agenda item must call on States to take all the requisite measures at the national and international levels to prevent any acts of violence against diplomatic missions, representatives and officials, including during periods of armed conflict, and to ensure that, with the participation of the United Nations, such acts were thoroughly investigated with a view to calling offenders to account.

25. Receiving States were obliged to secure the protection, security and safety of diplomatic and consular missions. Under international law, failure to respect the principle of their inviolability engaged the responsibility of States.

26. **Mr. Abdelsalam** (Sudan) said that, although his Government had missed the deadline for submitting a report in accordance with General Assembly resolution 59/37, it had set up a specialized unit within the Ministry of the Interior which was responsible for ensuring the safety and security of diplomatic and consular missions and representatives. The unit comprised high-calibre officers and policemen who received intensive training on the privileges and immunities set forth in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. The unit had been increased in size to enable it to provide protection for the United Nations Mission in the Sudan and peacekeepers. A major thoroughfare in Khartoum had been closed at the request of a mission which had not been under any threat but which had indicated that such a move would be in keeping with its Government's worldwide security plan. Thus Sudan was not only fulfilling its commitments but was prepared to go even further than was necessary in order to meet its obligations.

Agenda item 75: Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts (A/61/222 and Add.1)

27. **Mr. Playle** (Australia), speaking on behalf of the CANZ group (Australia, Canada and New Zealand), applauded the adoption of Additional Protocol III to the Geneva Conventions, establishing the red crystal as an additional protective emblem for humanitarian workers, free of any extraneous political or religious connotations and enjoying the same status as the red cross and the red crescent. The adoption of that Additional Protocol, and the consequent amendments to the Statutes of the International Red Cross and Red Crescent Movement, had also allowed for the simultaneous admission into the Movement of the Israeli national society, Magen David Adom, and the Palestinian Red Crescent Society. That was a crucial step towards ensuring that access to humanitarian assistance would be universally available. In addition, the Protocol would enhance the protection of people affected by conflicts and natural disasters, as well as the humanitarian workers who provided critical assistance to those in need. More than 70 States had signed Additional Protocol III thus far, including all three of the CANZ countries, which were now undertaking the ratification process. The CANZ group urged all States to become parties to the Protocol, whose entry into force would resolve a long-standing issue within the Movement and would enhance the capacity of national societies to deliver humanitarian assistance freely, safely and efficiently.

28. The CANZ countries also welcomed the accession of Nauru and Montenegro to the four Geneva Conventions, which had brought the number of States parties to 194, making those Conventions the only truly universal treaties. The CANZ countries called on all States which had not done so to become Parties to the three Additional Protocols. They, too, should enjoy universality. In that connection, the CANZ countries welcomed the accession of the Sudan to Additional Protocols I and II.

29. The CANZ group wished to acknowledge the tireless work of the International Committee of the Red Cross (ICRC) as the guardian of international humanitarian law and protector of persons caught up in armed conflict. ICRC continued to promote understanding of the rules of international humanitarian law, notably through its study on customary international humanitarian law, which was already proving to be an important resource for States. ICRC, with its United Nations partners, also disseminated the rules of international humanitarian law to all parties to an armed conflict, which was crucial for promoting respect for those rules and monitoring their implementation.

30. The CANZ countries firmly believed that the principles of international humanitarian law and international human rights law must be respected by all

in order to enhance the legal and physical protection of civilians in armed conflicts. All three States were parties to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and also supported other initiatives to protect civilians, including endorsement of the responsibility to protect. The most important aspect of universal adherence to the Geneva Conventions and their Protocols was universal implementation by all. The CANZ group called on all States to fulfil their obligations under common article 1 of the Geneva Conventions, and on the United Nations to be timely in its engagement, to be vigilant in its monitoring and to have the political will to draw upon the full range of possible measures to protect civilians.

31. **Ms. Sotaniemi** (Finland), speaking on behalf of the European Union; the acceding countries Bulgaria and Romania; the candidate countries Croatia and the former Yugoslav Republic of Macedonia; the stabilization and association process countries Albania, Bosnia and Herzegovina, Montenegro and Serbia; and, in addition, Moldova and Ukraine, said that the European Union was fully committed to promoting compliance with international humanitarian law, as shown by the adoption of the European Union Guidelines on the subject in December 2005. The European Union urged all Member States that had not yet done so to accede to Additional Protocols I and II to the Geneva Conventions and to consider accepting the competence of the International Fact-Finding Commission, pursuant to article 90 of Additional Protocol I. The European Union welcomed the adoption of Additional Protocol III, establishing an additional emblem, the red crystal, alongside the existing emblems, and urged Member States to sign and ratify the Protocol with a view to its early entry into force, bearing in mind that the purpose of the red crystal was to enhance the protection of victims. The Geneva Conventions currently enjoyed universal acceptance, and most of their provisions and those of the Additional Protocols of 1977 were generally recognized as customary international humanitarian law. It was important now to focus on the full implementation and dissemination of that law. In that context, the European Union wished to reiterate that certain minimum standards of humanity, including those established under common article 3 of the Geneva Conventions, must be respected in all situations of armed conflict.

32. The European Union commended ICRC for its continuous and manifold efforts to disseminate international humanitarian law, in particular through its comprehensive study on the subject, which deserved careful examination by Member States. The European Union also welcomed national efforts to disseminate and implement international humanitarian law, particularly through training of armed forces. The European Union was currently implementing the pledges it had made at the 28th International Conference of the Red Cross and Red Crescent concerning dissemination of international humanitarian law among young people.

33. The European Union recalled with satisfaction the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147). The principles and guidelines addressed in a systematic way the question of remedies and reparation for victims under national law. At the international level, the International Criminal Court had a critical role to play in promoting respect for international humanitarian law by prosecuting and adjudicating perpetrators for crimes of genocide, crimes against humanity and war crimes. However, an equally important function of the Court was to deter those who might be tempted to commit such appalling acts and to ensure compensation for victims. The European Union reiterated its call to all States to ratify or accede to the Rome Statute.

34. **Mr. Lidén** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Geneva Conventions had achieved universal recognition as the principal legal basis for protection of persons in armed conflict, but much remained to be done in order to achieve universal compliance with the rules contained in them. As was evident from the study recently published by ICRC, many rules of Additional Protocols I and II had also become part of customary international humanitarian law and were thus universally applicable to all States and parties to conflicts. The Nordic countries welcomed the ICRC study and hoped that States would disseminate it as widely as possible. Promoting and ensuring respect for international humanitarian law was a duty of all States.

35. The entry into force of Protocol V to the 1980 Convention on Certain Conventional Weapons and the

adoption of Additional Protocol III to the 1949 Geneva Conventions had contributed to the development and refinement of international humanitarian law. The Nordic countries stood behind those new instruments. Another trend that was contributing to the development of international humanitarian law was the increasing willingness among States and among United Nations organs and bodies to discuss and promote it through, inter alia, recent Security Council resolutions on the protection of civilians in armed conflict, on women affected by armed conflict and on children in armed conflict. The challenge now was to translate those resolutions into concrete action to protect innocent civilians.

36. The International Criminal Court was of paramount importance in the quest to ensure compliance with international humanitarian law and end impunity for war crimes, crimes against humanity and genocide. It was important to continue efforts to achieve universal adherence to the Rome Statute. It was also vital that States support and cooperate with the Court so that it could fulfil its tasks. The International Fact-Finding Commission established under article 90 of Additional Protocol I to the 1949 Geneva Conventions also had a role to play with regard to compliance with international humanitarian law. The Nordic countries urged States to accept the competence of the Commission to inquire into any alleged grave breaches of international humanitarian law. It was of the utmost importance that the international community react promptly to such breaches. Equally important was prevention of violations of international humanitarian law through awareness-raising campaigns and education. The role and importance of ICRC in that regard must be emphasized. The Nordic countries were deeply appreciative of the efforts of ICRC with respect to dissemination of international humanitarian law and provision of training on the subject, as well as protection of persons in situations of armed conflict.

37. The Secretary-General's report (A/61/222) indicated that training of military and armed forces in international humanitarian law remained a priority for many States. Such training was paramount to ensure respect for humanitarian standards. Accountability must also be ensured through national legislation and procedures, and all suspected abuses of humanitarian law must be investigated. The Nordic countries called upon all States and entities to respect the existing body of international humanitarian law, particularly with regard to the obligations to protect civilians.

38. **Mr. Talbot** (Guyana), speaking on behalf of the Rio Group, observed that the 1977 Protocols to the 1949 Geneva Conventions were currently so widely accepted that they were sometimes equated with customary law and considered binding on all. Nevertheless, while 194 States were parties to the Geneva Conventions, not all of them were parties to the Protocols. There had been an intense effort in the context of the United Nations to promote better understanding and implementation of the Protocols with a view to ensuring their universality. For example, General Assembly resolution 59/36, adopted in 2004, called upon all States parties to the Geneva Conventions that had not yet done so to consider becoming parties to the Additional Protocols at the earliest possible date, and also called upon States to make the declaration provided for under article 90 of Protocol I. The Rio Group reiterated those calls.

39. The Rio Group noted with appreciation the ICRC initiatives aimed at reaffirming, strengthening and disseminating international humanitarian law, in particular the continuation of the project "Reaffirmation and development of international humanitarian law, through which ICRC had been able to affirm important concepts related to the fight against terrorism and the status and rights of detainees in that context. The Rio Group appreciated the extensive work of ICRC in the field of legal and technical assistance for the adoption of national legislation required for the observance of international humanitarian law at the national level. It also welcomed the initiatives taken by States for the dissemination and full implementation of the Geneva Conventions and their Protocols at the national level. Such initiatives, coupled with concrete efforts to protect civilians, especially vulnerable groups, were the key to full compliance with international humanitarian law. While the human family waited for the time when conventions to protect the victims of war would be unnecessary because war itself had been eliminated, the Geneva Conventions and their Additional Protocols would remain fundamental international agreements providing for assistance to all victims of war, without discrimination.

40. **Mr. Al-Hebsi** (United Arab Emirates) said that despite the efforts of the United Nations over the previous 61 years aimed at establishing the supremacy of the rule of international law and promoting

implementation of the principles set out in the Charter and other human rights conventions and protocols, the world had continued to witness unprecedented events involving mass killing, arbitrary arrest, physical aggression and mutilation and other crimes against humanity, together with forced displacement of populations and denial of access to affected areas for humanitarian and assistance personnel. Those continued violations and war crimes made it incumbent upon the international community, now more than ever, to stop and re-evaluate international obligations concerning the implementation of human rights instruments, particularly the four Geneva Conventions of 1949 and their Additional Protocols. That meant not only promoting the principles set out in those instruments, but also strengthening existing international monitoring, verification and accountability mechanisms in order to ensure that the perpetrators of such crimes did not go unpunished.

41. The United Arab Emirates attached great importance to States' respect for the provisions of the Geneva Conventions and their Additional Protocols and expressed its deep concern at the continued violations by Israel of its obligations under those instruments, both in the Palestinian and Arab territories that Israel had occupied since 1967 and in its recent war in the region. Everyone had surely seen the television broadcasts and reports by humanitarian agencies concerning the sad and heinous events that had taken place in civilian communities in Lebanon and Gaza over the past summer, including massacres committed by Israeli forces armed with internationally banned weapons. The conflict, which had destroyed entire cities and killed more than 100,000 defenceless civilians, was one of the most horrendous acts of aggression in recent history. Those shameful Israeli violations, which still afflicted the besieged people of Gaza, could have been prevented if the international community had taken preventive measures to deter the policies of aggression against the Palestinians and other Arab populations espoused by successive Israeli Governments over the previous six decades.

42. Continued international tolerance for the repeated aggressions of Israel against the Arab peoples would reduce the credibility and universality of the Geneva Conventions. The United Arab Emirates therefore called upon the international community, and particularly the influential Quartet members which were also members of the Security Council, to do everything in their power to avoid the application of a double standard, stop the grave violations by Israel and ensure its compliance with the four Geneva Conventions and their Additional Protocols in all occupied Arab and Palestinian territories, including Al-Quds al-Sharif.

43. **Mr. Abdelsalam** (Sudan) said that his country regarded the provisions of the Geneva Conventions as constituting peremptory norms, and had abided by them in its two major internal conflicts, in the south and in Darfur. Moreover, it had recently ratified Additional Protocols I and II. The Sudan had a particular interest in common article 3 and Additional Protocol II relating to the protection of victims of non-international armed conflicts. Non-State actors were sometimes armed as well as or better than States, and often committed grave crimes such as killing aid workers and commandeering humanitarian food aid. The Sudan welcomed the fact that Additional Protocol II held non-State actors accountable, but believed that sincere implementation of those provisions, as well as of measures to prevent such actors from obtaining arms, was still lacking.

44. **Mr. Lauber** (Switzerland) said that, as the depositary State of the Geneva Conventions and their Additional Protocols, Switzerland had the honour to inform the Committee that the Conventions had achieved universality: the recent accessions of Nauru and Montenegro had brought the number of States parties to 194. The number of States parties to Additional Protocol I had reached 166, while Additional Protocol II had 162. The International Fact-Finding Commission established by article 90 of Additional Protocol I had been recognized by 69 States.

45. On 8 December 2005, the High Contracting Parties to the Geneva Conventions had adopted the third Additional Protocol relating to the adoption of an additional distinctive emblem. Switzerland had taken part in the elaboration of the Protocol and welcomed the establishment of the red crystal emblem, which would help to achieve the universality sought by the International Red Cross and Red Crescent Movement. He encouraged the High Contracting Parties to ratify the Protocol. To date, 70 States had signed it and 6 had ratified it.

46. Violations of international humanitarian law were too common. In many conflicts, civilians were

deliberately targeted, while the fundamental rights of prisoners and detainees were denied. Failure to comply with the Geneva Conventions could not be justified on any grounds. Humanitarian law constituted a minimum standard to be respected in all circumstances, including the complex and difficult fight against terrorism.

47. The obligation of States to respect and to ensure respect for humanitarian law extended to the recruitment and supervision of private military or security companies active in armed conflict. Switzerland, in collaboration with ICRC, had launched a process of intergovernmental debate on that topic. It had also launched an ongoing process of informal discussion on other new challenges to humanitarian law, such as the direct participation of civilians in hostilities, the impact of high- and low-tech methods of combat and the growing role of armed non-State actors. Switzerland encouraged all States parties to Additional Protocol I that had not yet done so to recognize the competence of the International Fact-Finding Commission established by article 90 of the Protocol.

48. Commending the remarkable work of ICRC, he welcomed in particular the publication of its study, *Customary International Humanitarian Law*, and encouraged all States to make good use of it.

49. **Mr. Alday González** (Mexico) said that, despite the achievements of the past 140 years with regard to the codification of international humanitarian law, humanitarian crises continued to occur around the world. Regrettably, the protection of civilians during hostilities was the exception rather than the rule. Renewed efforts were therefore required in order to ensure that international humanitarian law was effectively applied.

50. The universality of the main international humanitarian law instruments was a first step in that direction. Those instruments were universal not only in terms of formal adherence to them but also in the sense that the principles on which they were based were of a customary nature, as the International Court of Justice had stated in its advisory opinion on the legality of the use or threat of use of nuclear weapons. States were therefore bound by those principles whether or not they were parties to the instruments containing them.

51. The adaptation of existing rules to meet urgent needs would also result in more effective application of humanitarian law. In that context, the primacy of the protection of non-combatants over the pursuit of legitimate military objectives must be guaranteed. The adoption of the third Additional Protocol was a positive development in that regard.

52. The obligation "to respect and to ensure respect for" international humanitarian law, established by common article 1 of the Geneva Conventions, was an active obligation, as stated by the International Court of Justice in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory. The Security Council had assumed an important responsibility in that regard. However, the States parties to the Geneva Conventions and their Additional Protocols must likewise fulfil their obligations in accordance with article 7 of Protocol I. The depositary too had responsibilities in that regard.

53. The rules of international humanitarian law were not open to interpretation. Moreover, the Martens Clause remained valid, as had been affirmed by the International Court of Justice. States were not permitted to restrict the rights of wounded, sick or shipwrecked troops or prisoners of war, all of whom were protected by humanitarian law. Even persons without prisoner-of-war status were entitled to the protection provided for in article 75 of Additional Protocol I, which established fundamental minimum guarantees. International humanitarian law also limited the extent to which protected persons could renounce their rights, thereby safeguarding the inalienability of those rights.

54. Threats to international security now came from a variety of sources. Armed conflicts no longer involved only State actors or organized forces within the meaning of Additional Protocol II. Mexico strongly condemned terrorism precisely because of the suffering it inflicted on civilian populations. International humanitarian law expressly prohibited the use of terrorist acts as a method of combat. At the same time, the fight against terrorism must be conducted within the bounds of international humanitarian, human rights and refugee law. That principle was embodied in the Inter-American Convention against Terrorism, to which most of the States on the American continent were parties. Moreover, the fight against terrorism should not be used as a reason to establish different levels of application of humanitarian law.

55. Mexico welcomed the efforts of the States to strengthen international humanitarian law, as outlined in the Secretary-General's report (A/61/222). During

the period covered by the report, Mexico had been strengthening its institutional capacity for the implementation of international humanitarian law at the national level. It had ratified the Rome Statute of the International Criminal Court in October 2005. It had also abolished the death penalty and submitted a draft law to the legislature on the use of the Red Cross emblem, which was due to be approved soon. Domestic procedures for the signature of Protocol III had been concluded satisfactorily. Mexico was also taking steps to disseminate international humanitarian law in government and academic circles.

56. Mexico called for renewed commitment to the humanitarian principles which served to protect the victims of armed conflict and which had saved thousands of lives over the years.

57. **Mr. Al-Obaidli** (Qatar) said that the Geneva Conventions and their Additional Protocols had become part of international law, but their implementation remained an issue. He praised the efforts of ICRC to create mechanisms to ensure that international law was honoured, but said that States, ICRC and the International Federation of Red Cross and Red Crescent Societies (IFRC) needed to examine on an equal basis violations committed by both large and small States. The increasing destructive power of traditional weapons had made the issue of the protection of civilians in armed conflicts more pressing than ever. Qatar was a party to the Geneva Conventions and Additional Protocols I and II, and international humanitarian law was taught in its military, police and legal academies. Qatar called on all parties to conflicts to honour international humanitarian law.

58. **Mr. Tachie-Menson** (Ghana), reaffirming Ghana's commitment to the Geneva Conventions of 1949 and their 1977 Additional Protocols, said that those instruments had played an invaluable role in limiting the excesses of parties to conflicts and thereby reducing to some extent the humanitarian costs of such conflicts. Any assessment of the status of the Conventions and their Additional Protocols must take account of the current global context of internal and regional conflicts and the war on terrorism. While some aspects of the instruments should be adapted to meet the challenges posed by new methods of warfare, it did not follow that they were becoming irrelevant. Indeed, they were currently more valid and relevant than ever before.

59. The war on terrorism posed a particularly difficult challenge, namely whether rules designed to govern the conduct of States that were parties to a conflict could be applied to non-State actors such as extremist groups. Some States took the view that the rules of international humanitarian law did not cover terrorist groups, since such groups had abandoned all norms of civilized conduct. However, it could be argued that those rules — which prohibited attacks against civilian populations and acts or threats of violence designed to spread terror among such populations — did in fact cover terrorist groups if their activities were defined as "armed conflicts" within the meaning of the Geneva Conventions and their Additional Protocols. It was therefore important not to deny suspected terrorists their basic rights and due process.

60. His delegation opposed self-serving and subjective interpretations of the Conventions and Protocols, which not only weakened the moral authority of those promoting such interpretations but also undermined the credibility and universality of the instruments themselves. States should avoid being provoked into unilateral action that could lead to the unravelling of international humanitarian law, both codified and customary.

61. The issue of asymmetrical conflict also posed new challenges. The recent crisis in Lebanon had demonstrated that the wars of the future might involve non-State actors armed with high-tech weapons taking on State armies. The crisis had also highlighted the complex issue of proxy wars being fought by non-State actors on behalf of State sponsors. In such cases, it might be difficult under international humanitarian law to apportion liability to the non-State actor in question. It might also be difficult to establish the culpability of the State sponsor, even if its activities in that capacity could be proved.

62. The two Additional Protocols of 1977 had become indispensable for the protection of civilians in armed conflicts. With regard to non-international conflicts — the subject of Additional Protocol II — the 2005 World Summit Outcome (A/RES/60/1) and Security Council resolution 1674 (2006) had also emphasized the need to protect populations at risk. Meanwhile, peacekeeping forces in various conflict zones were being given robust mandates to protect civilians, thus providing an international enforcement capability when the parties to a conflict were unable or

unwilling to observe the rules of international humanitarian law. In addition, the International Criminal Court would be playing an important role in the protection of civilians in armed conflict. Lastly, he paid tribute to the vital work of ICRC in promoting international humanitarian law.

63. **Mr. Krishnan** (Malaysia) said that the Committee must underline the need for renewed compliance with international humanitarian law. Despite almost universal accession to the relevant treaties, atrocities continued to be perpetrated against civilians, non-combatants and other protected persons, even in countries that were parties to the Geneva Conventions and their Additional Protocols. He thanked the countries which had described their experience with regard to implementing those instruments. Their efforts would serve as a useful guide for other countries and would contribute to global efforts to harmonize laws and build capacity with regard to international humanitarian law. Praise was also due to ICRC for the publication of the study entitled *Customary International Humanitarian Law*.

64. Malaysia was committed to the maintenance of international peace and security and contributed to United Nations peacekeeping operations. It also took seriously its obligation to ensure proper dissemination of the principles and rules of international humanitarian law, as codified in the Geneva Conventions, to which it was a party, and their Additional Protocols, to which it had not acceded. Malaysia was also a party to several other treaties relating to international humanitarian law.

65. Knowledge, awareness and understanding of the principles of international humanitarian law were the cornerstone of compliance therewith. In that connection, Malaysia was working on the establishment of a national committee on international humanitarian law which would review the country's legislation for compliance with international norms, study the international instruments on humanitarian law to determine the possibility of acceding to them, and disseminate international humanitarian law in general. Malaysia already worked closely with ICRC to raise awareness of international humanitarian law among young people and members of the armed forces and security forces.

66. **Mr. Tajima** (Japan) said that Protocols I and II Additional to the Geneva Conventions had come into force in Japan in February 2005. Japan had also recognized the competence of the International Fact-Finding Commission established by article 90 of Additional Protocol I. All the necessary legislative work to implement the two Protocols had been completed. With a view to promoting understanding of them, the Ministry of Foreign Affairs, in conjunction with the Japanese Red Cross Society, had sponsored a symposium on international humanitarian law in 2005 and the Asia Cup 2006, an international law moot court competition on international human rights and humanitarian law. His Government attached great importance to implementing international humanitarian law so as to strengthen the rule of law in the international community.

67. **Ms. Odaba-Mosoti** (Kenya) commended the work of ICRC and in particular its efforts to consolidate a legal reading of the complex questions bound up with the fight against terrorism, including the development of guidelines on the detention of persons. Accession to the Geneva Conventions and Additional Protocols I and II thereto was of paramount importance in ensuring the safety of civilians. Kenya was a party thereto and in 2002 had accordingly set up a national committee composed of representatives of key government ministries, which was responsible, inter alia, for coordinating and monitoring the implementation of international humanitarian law in Kenya, informing the Government of international humanitarian law instruments that needed to be ratified and reviewing, recommending and monitoring related measures and mechanisms at the national level. The committee was also actively involved in training activities for police and prison officers and in the dissemination of information on international human rights law. It advised the Government on the relevant implementing legislation and was preparing a training manual in the field, in conjunction with the University of Nairobi. She expressed appreciation to ICRC for its continued support of the national committee and reiterated Kenya's full commitment to the Geneva Conventions and their Additional Protocols. She welcomed the adoption of the third Protocol, which Kenya was taking steps to ratify, following its signature in March 2006.

68. **Mr. Elji** (Syria) said that Islamic law had been one of the first legal systems to advocate humanitarian rules for warfare and that Europe's history of bloody wars had led to the codification of such rules in the

Geneva Conventions. The universalization of those Conventions was an indication of both the soundness of their principles and the need to enforce them strictly. Regrettably, however, Israel had consistently and flagrantly violated them since its establishment, despite the international community's repeated calls on it to apply the Conventions in the territories that it occupied. Israel continued to target children, carry out settlement activities and construct its wall in the occupied Palestinian territory in violation of the advisory opinion of the International Court of Justice ruling that wall illegal. In the occupied Syrian Golan, Israel had displaced people and destroyed villages despite Security Council and General Assembly resolutions declaring such activities illegal. Israel had also damaged the environment and barred Syrian citizens from access to water while diverting it for the benefit of its settlers. Israel's recent war of aggression in Lebanon had targeted civilians and infrastructure and polluted the Mediterranean by attacking oil-storage facilities. Israel's barbarity was demonstrated by the fact that it had dropped over a million cluster bombs on southern Lebanon during the two days between the adoption of Security Council resolution 1701 (2006) and the time when the cessation of hostilities that resolution called for went into effect.

69. The world was witnessing unprecedented destruction and displacement due to armed conflict, foreign occupation and State terrorism, much of it unfortunately in the Middle East, a situation which would test the ability of international human rights bodies to enforce the Geneva Conventions and their Additional Protocols. His delegation hoped, in particular, that the international community would provide adequate support for the new Human Rights Council's two fact-finding missions investigating violations in the occupied Palestinian territory and Lebanon.

70. **Ms. Ramos Rodríguez** (Cuba) said civilians were being increasingly targeted in armed conflicts; that was clearly the case in the occupied Palestinian territory. In the light of recent violations of international humanitarian law, resulting from unilateralist and imperialistic attitudes, the international community was called on to promote strict observance of the rules governing the protection of civilians in armed conflict. That could only be ensured through the renunciation of expansionistic wars and the commitment of all States to multilateralism and to the Charter of the United Nations. It was also important to ensure full compliance with international humanitarian law at the national level and to disseminate it more widely. Cuba was a party to the 1949 Geneva Conventions and their 1977 Additional Protocols and had incorporated into its national legislation all the necessary safeguards for their full implementation, particularly with regard to the protection of civilians. In Cuba, a centre for the study of international humanitarian law, operating under the auspices of ICRC and the Cuban Red Cross, had made a significant contribution to the dissemination and teaching of that law, both in Cuba and in Central America and the Caribbean. Cuba remained ready to continue cooperating with all the bodies concerned in promoting international humanitarian law in Cuba and elsewhere.

71. **Ms. Wilcox** (United States of America) said while her country welcomed efforts to promote respect for and implementation of the law of armed conflict, it was not a party to either of the Protocols Additional to the Geneva Conventions of 1949. In the case of Additional Protocol I, the reasons were well known. Any consideration of the obligations of States under the law of armed conflict must therefore take into account the different treaty regimes to which States had subscribed. Her delegation welcomed the ICRC study on customary international humanitarian law but was concerned about the methodology used and, in particular, questioned the basis for its conclusion that a significant number of rules in the Additional Protocols had achieved the status of customary international law and were applicable to all States, including those not parties thereto. Her delegation was also concerned about the conclusion that those provisions had become binding in the case of internal conflicts. However, the United States had signed Additional Protocol III and was working towards its ratification; it urged all other States to accede to it.

72. **Ms. Kaplan** (Israel) said that recent events illustrated the detrimental effect of the dilution of the laws of armed conflict and of the distinction between civilians and combatants on which those laws were based. It was the duty of combatants to distinguish themselves clearly from civilians; that was a basic principle of the law of armed conflict, but not one that was respected by terrorists. Israel had played an active part in the formulation of Additional Protocols I and II because of the importance it attached to the

development of the law of armed conflict and also because of its unique experience in applying its principles in the face of terrorism. While acknowledging the important contribution made by ICRC to the development and codification of international humanitarian law, her country had not been alone in expressing concerns about certain aspects of the Additional Protocols; many States as well as leading scholars, had questioned whether some of their provisions had a sound legal basis or served to advance humanitarian interests. When the instruments of international law were politicized, as had been seen in the current meeting, they were weakened, which could harm those they were designed to protect. Israel could not be a party to Additional Protocols I and II because political terminology had been allowed to intrude into their texts. However, it considered the adoption of Additional Protocol III to be a historic landmark since it significantly improved humanitarian protection in many circumstances.

73. **Mr. Saleh** (Lebanon) said that the Geneva Conventions and their Additional Protocols had strengthened international humanitarian law. Lebanon honoured all international conventions on humanitarian law, which was taught in all its military academies and universities. The laws of war had emerged over a period of many years and had put an end to impunity for massacres and provided protection for civilians, the sick and wounded and prisoners of war; they had established the principles of distinction and proportionality, as embodied in articles 48 and 51 of Additional Protocol I. However, those two principles, which were part of customary international law and were therefore binding on every nation, were constantly flouted. In its recent aggression against Lebanon, Israel had caused unnecessary suffering among the civilian population through its use of cluster bombs, vacuum bombs and phosphorus bombs. Furthermore, there were reports that the Israeli forces had also used depleted uranium bombs and called for an international investigation of those allegations. The Israeli forces had deliberately targeted the Lebanese civilian population and vital infrastructure; and had committed massacres in Beirut and southern Lebanon. They claimed that they had issued warnings, but that in itself was a violation of article 51, paragraph 2, of Additional Protocol I, which prohibited acts or threats of violence whose primary purpose was to spread terror among the civilian population. They had sought to justify their attacks by claiming that combatants were among the civilian population; however, no combatants had been identified among the bodies recovered. Moreover, article 50, paragraph 3, of Additional Protocol I stated that the presence of non-civilians within a population did not deprive it of its civilian character. The Israeli forces had even targeted persons seeking to rescue victims, including Red Cross personnel. He called on the international community to compel Israel to comply with the rules of international law, including international humanitarian law.

74. **Ms. Pellandini** (Observer for the International Committee of the Red Cross (ICRC)) said that the universal acceptance recently achieved by the four Geneva Conventions of 1949 was a powerful counter-argument to those who claimed that international humanitarian law was inadequate to deal with contemporary armed conflict situations. Another significant recent development was the adoption on 8 December 2005 of Additional Protocol III — already ratified by six States and signed by 76 — which recognized the red crystal as an additional distinctive emblem enjoying the same international status and protection as the red cross and red crescent emblems. ICRC looked forward to its entry into force on 14 January 2007. It was pleased to note that to date 166 States had acceded to Additional Protocol I and 162 to Additional Protocol II and that there had been an increase in the number of accessions to the Rome Statute of the International Criminal Court. It was encouraged by the Secretary-General's report on the Protocols (A/61/222), which highlighted the commitment of many Governments to the implementation of international humanitarian law. That commitment was also reflected in the work of national committees set up in that field, which cooperated closely with ICRC and its related Advisory Service. It would be convening the second universal meeting of those committees in early 2007.

75. She drew attention to ICRC's recently published study on customary international humanitarian law, of which it provided the first thorough global assessment. It showed that many rules which, as treaty law, applied only in international armed conflicts applied also in non-international armed conflicts and would be a useful tool for a variety of groups. International humanitarian law, which must be respected by non-State armed groups as well as States, remained the most effective legal framework for the conduct of hostilities. The Geneva Conventions and their

Additional Protocols made a valuable contribution to the protection of human dignity and the preservation of humanity in the midst of war. It remained for Governments to take the necessary measures for the national implementation and wide dissemination of international humanitarian law. ICRC and its Advisory Service remained ready to give their support to all initiatives undertaken by States to that end.

The meeting rose at 12.40 p.m.

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Held at Headquarters, New York, on Monday, 23 October 2006, at 11 a.m.

Chairman: Mr. Gómez Robledo .... (Mexico)
later: Mr. Onisii (Vice-Chairman) .... (Romania)

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The meeting was called to order at 11.05 a.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (A/61/10)

1. **The Chairman** expressed the Committee's appreciation of the contribution made by the International Law Commission to the progressive development of international law and its codification in accordance with Article 13 of the Charter of the United Nations. Its current report was extensive and very substantive and provided an excellent basis for a stimulating discussion.

2. **Mr. Pambou-Tchivounda** (Chairman of the International Law Commission), introducing the report of the International Law Commission (A/61/10), said that the Commission relied on the Sixth Committee for advice from Governments and information on State practice that was not otherwise readily available. That was particularly the case for new topics involving emerging practices not easily accessible to the public. The Commission's success in the codification of international law, therefore, depended largely on the support it received from the Committee.

3. Speaking first on the non-substantive chapter of the report, chapter XIII, he said that the topic "Expulsion of aliens" would be considered in 2007. The topics that the Commission had endorsed for inclusion in its long-term programme were: "Immunity of State officials from foreign criminal jurisdiction"; "Jurisdictional immunity of international organizations"; "Protection of persons in the event of disasters"; "Protection of personal data in transborder flow of information"; and "Extraterritorial jurisdiction". It had decided to request the views of Governments on the desirability of further work on the topic "The most-favoured-nation clause".

4. Since its last report, the Commission had received a visit from Judge Rosalyn Higgins, President of the International Court of Justice, and had been cooperating with other bodies, including the Inter-American Juridical Committee, the Asian-African Legal Consultative Organization, the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law.

5. The Commission attached great importance to the International Law Seminar, which was held annually in Geneva during the meetings of the Commission and enabled young lawyers, particularly those from developing countries, to familiarize themselves with the Commission's work and the activities of international organizations with headquarters in Geneva. It expressed its appreciation to those Governments that had contributed to the Seminar and urged Governments to provide financial assistance as soon as possible. A question of continuing concern to the Commission was that of honorariums, which affected the work of Special Rapporteurs; it urged the General Assembly to reconsider the matter with a view to their restoration.

6. He concluded his remarks on chapter XIII by expressing the Commission's appreciation for the high quality and competence of its secretariat, the Codification Division of the Office of Legal Affairs. The importance of the Division's role lay in the fact that it dealt with both the substance of the Commission's work and the procedural and technical aspects of servicing. Since the Division also served as the secretariat of the Sixth Committee, it was an invaluable and irreplaceable link between the two bodies and provided a high-quality service that must be preserved. In that regard, the Commission was indebted to the Division for the memorandum entitled "Expulsion of aliens" (A/CN.4/565) and for the Commission's new website, which constituted an invaluable research tool.

7. Turning to chapter IV, "Diplomatic protection", he said that the Commission had adopted on second reading the entire set of draft articles, together with commentaries. The first-reading structure of the draft articles had been retained, with two articles merged and one new draft article added. Draft article 1 had been reformulated to omit the reference to the State adopting in its own right the cause of its national and to focus instead on the responsibility of the injuring State. The reformulation reserved the question as to whether the State was acting in its own right or that of the individual or both. Draft article 2 was adopted as formulated on first reading. As to draft article 3, the first-reading text had been retained, with some additional precision. The Commission had also retained draft article 4 largely as adopted on first reading, with some technical amendments.

8. A number of amendments had been made to the new version of draft article 5, on the continuous nationality of a natural person. First, the nationality in

question had to remain that of the claimant State continuously from the *dies a quo* to the *dies ad quem*, whereas the first-reading version had merely required such conformity of nationality at both those points. To ease the claimant State's burden of proving continuity over what could be a substantial period of time, the Commission had included a rebuttable presumption in favour of continuity, if the relevant nationality existed at the two crucial dates. The Commission had decided that the *dies ad quem* should be the date of the official presentation of the claim, rather than the date of the resolution of the claim, since State practice provided insufficient support for the latter. Furthermore, it had been held that it was illogical to base the admissibility of a claim on whether the relevant nationality existed at the time of the settlement of the claim. Apart from some minor drafting improvements, the other main change had been the inclusion of a new paragraph 4 to cover situations in which the individual had acquired the nationality of the respondent State after the date of the official presentation of the claim.

9. Draft articles 6, 7 and 8 were largely the same as those adopted on first reading, apart from the insertion in draft article 8, paragraph 2, of the phrase "in accordance with internationally accepted standards", which had been included in order to provide a broader standard encompassing people who would not otherwise fall within the ambit of the 1951 Convention relating to the Status of Refugees and its Protocol.

10. In chapter III of Part Two, draft articles 9 to 13 dealt with the nationality of legal persons. Draft article 9, on the State of nationality of a corporation, had been modified substantially in response to comments from Governments and Commission members. The new version clarified the question of the State which might be deemed the State of nationality of a corporation for the purpose of exercising diplomatic protection. The second sentence of the draft article was designed to address situations where the connection between the corporation and the State in which it had been incorporated was so slight that it would not justify giving priority to that State's exercise of diplomatic protection. That sentence therefore set forth the three cumulative criteria for establishing when the connection with the State of incorporation was too tenuous.

11. The changes to draft article 10 on the continuous nationality of a corporation largely mirrored those made to draft article 5. Paragraph 2 corresponded to draft article 5, paragraph 4.

12. Draft articles 11 to 13 had not elicited much opposition from Governments or within the Commission, and accordingly the second-reading version was substantially the same as the first-reading version apart from some minor drafting improvements.

13. The second-reading text of Part Three, entitled "Local remedies", had only two draft articles, as opposed to the three contained in the previous version, because the Commission had decided to merge the draft article 15 which had been adopted on first reading into draft article 14. Draft article 14, which laid down the general rule of the exhaustion of local remedies, generally echoed the first-reading formulation, apart from the inclusion of paragraph 3 consisting of the text of former draft article 15.

14. Draft article 15 of the second-reading text corresponded to the draft article 16 which had been adopted on first reading. The four provisions of the original text had become five, as the Commission had decided to split former subparagraph (c) into two. The Commission had recast subparagraph (a) to include a reference to "reasonable available local remedies" in order to answer the concern that the standard of a "reasonable possibility of effective redress", the wording adopted on first reading, was too open-ended. Subparagraph (c) provided for a "relevant" connection in order to cover situations such as those arising in the *Aerial Incident of 27 July 1955* (Israel v. Bulgaria) case, where it would be unreasonable to expect the individuals in question to have exhausted local remedies in a State with which they had no relevant connection. Subparagraph (d) reflected the second element in the first-reading version of subparagraph (c) and dealt with special circumstances, such as denial of entry, threats against the safety of an individual making it impossible for that person to bring a case before the local courts, or criminal conspiracies obstructing the instituting of proceedings.

15. Part Four, entitled "Miscellaneous provisions", contained the same provisions as those adopted on first reading, apart from some minor drafting adjustments, plus one new draft article. Draft article 16, which corresponded to the draft article 17 adopted on first reading, had been reformulated along the lines suggested by the Government of the Netherlands. Similarly, draft article 17 (draft article 18 of the first-

reading text) had been reworded to make it clear that, while the draft articles established general rules, special rules concerning or excluding diplomatic protection applied elsewhere. It was based on article 55 of the articles on responsibility of States for internationally wrongful acts adopted by the Commission in 2001. The Commission had decided to retain draft article 18 concerning the protection of ships' crews largely in the form adopted in the first-reading draft article 19.

16. Lastly, the Commission had adopted a new draft article 19, entitled "Recommended practice", which encouraged States, first, to exercise diplomatic protection, secondly, to consult injured persons on whether or not to exercise such protection and on the form of reparation to be sought, and thirdly, to transfer compensation obtained from the responsible State to the injured person. The use of the word "should" in the chapeau of the draft article and the latter's title emphasized the recommendatory nature of the provision.

17. The Commission recommended that the General Assembly should elaborate a convention on the basis of the draft articles and accompanying commentaries. Lastly, he drew attention to the contents of paragraphs 47 and 48 of the report.

18. Chapter V (International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)) contained a preamble and eight draft principles on the liability aspect of the topic, which completed the Commission's consideration of the subject as a whole. In that connection, he drew attention to paragraph 64 of the report. The draft principles were intended to be general and residual in character and were without prejudice to the application of rules concerning State responsibility. Their scope was the same as that of the draft articles on the prevention of transboundary harm from hazardous activities which had been adopted in 2001, and they thus dealt with primary rules. The same threshold of "significant damage" had been retained in order to trigger the operation of the draft principles. The latter did not address issues associated with the global commons, which, in the opinion of the Commission, had their own particular features requiring separate treatment.

19. The draft principles rested on a number of policy considerations. In the main, the activities covered by the draft principles were linked to socio-economic development. Their value in that respect had to be weighed against other societal values and the primary consideration that a victim should not alone bear the loss resulting from any harm which might have occurred. For that reason, compensation and response measures were essential components of the draft principles, which sought to attach liability primarily to the operator. Such liability would be without proof of fault and might be subject to limitations, exceptions and conditions. An accident involving hazardous activities might occasion such extensive loss that it would be necessary to have a practicable system of allocating it. Hence losses might be spread through supplementary funding schemes involving multiple actors, including the industry and the State, as appropriate.

20. The preamble placed the draft principles in the context of the Rio Declaration on Environment and Development, although prior provenance could be traced to the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment. It highlighted the two main concerns which had prompted the draft principles currently before the Committee, namely the need to put in place measures to ensure that anyone who suffered damage from transboundary hazardous activities was able to obtain prompt and adequate compensation and the need to take effective response measures to minimize the potential harm and loss from a particular incident.

21. Draft principle 1 basically embraced the same four criteria for identifying activities falling within the scope of the draft principles as had been employed in the draft articles on the prevention of transboundary harm from hazardous activities: the element of human causation, the element of risk, the element of extra-territoriality and the physical element. The commentary elucidated the meaning of the terms.

22. Draft principle 2, on the use of terms, was largely the same as that adopted on first reading, except that it also contained definitions of additional terms, such as "State of origin" and "victim". The threshold of "significant" damage had been retained. It was understood to refer to something more than "detectable" but not necessarily at the level of "serious" or "substantial". The definition of damage reflected the current practice followed in treaties and

domestic law of including damage to persons, property and the environment. The definition of "operator" remained a functional one.

23. Draft principle 3, entitled "Purposes", explained that the draft principles were essentially designed to encourage the award of prompt and adequate compensation to victims of transboundary harm and to preserve and protect the environment through mitigation, restoration or reinstatement. The definition of "victim" took in natural and legal persons as well as States. Practice indicated that States played a prominent role in pursuing claims for environmental damage. The extent to which it was possible to compensate for such damage must be determined in the light of the definition of the damage. Compensation could include the costs of reasonable measures to reinstate property or the environment, including natural resources and the costs of reasonable response measures.

24. Draft principle 4, entitled "Prompt and adequate compensation", was the cornerstone of the draft principles. It sought to operationalize the principle of prompt and adequate compensation through four interrelated elements supported in treaty practice and domestic legislation. First, each State should take measures to ensure that mechanisms were in place to facilitate prompt and adequate compensation for victims of transboundary damage from hazardous activities within its territory. Secondly, such a liability regime would include the imposition of liability on the operator without requiring proof of fault. The phrase "such liability should not require proof of fault" sought to capture a broad spectrum of designations used to describe contemporary doctrine imposing strict liability, among them: "liability without fault", "negligence without fault", "presumed responsibility", "fault per se", "objective liability" and "risk liability".

25. Thirdly, liability without proof of fault could be subject to conditions, limitations or exceptions, including, for example, exoneration if the damage was the result of an act of armed conflict, hostilities, civil war or insurrection or of a natural phenomenon. While such conditions, limitations or exceptions were part of the practice of States, the Commission wished to underline that they should not be inconsistent with the purposes of the draft principles as stated in draft principle 3. Fourthly, various forms of financial security, such as insurance, bonds or other financial guarantees, should be required in order to ensure the provision of prompt and adequate compensation. Such guarantees might include the establishment of second-tier supplementary funds, possibly from the industry concerned or from the State of origin.

26. Draft principle 5, "Response measures", sought to stress the importance of taking action immediately following the occurrence of an incident. Prompt response was an important element in the mitigation of damage. Members would recall that the text adopted on first reading grouped together a number of ideas in a single paragraph. In the new version currently before the Committee, the various levels of interaction that should take place upon the occurrence of an incident had been spelled out more specifically. The first three elements, namely, notification, response, and consultation and cooperation, concerned the role of the State of origin in spearheading response efforts. The other two, mitigation and assistance, applied to the States affected or likely to be affected by the damage, and to the States concerned, respectively.

27. Draft principle 6, entitled "International and domestic remedies", underscored the importance of both international and domestic compensation procedures. In contrast to the text adopted on first reading, it laid particular stress on the principle of equal access to domestic remedies, specifying the three constituent components of such access: equal access to administrative and judicial proceedings, application of the principle of non-discrimination, and access to information. Where feasible, information should be accessible free of charge or at minimal expense. The international claims settlement procedures to which the draft principle alluded might include, for example, mixed claims commissions or negotiations for lump-sum payments. The international component did not preclude the possibility that the State of origin might make a contribution to the affected State for the disbursement of compensation claims under a national procedure established by the affected State.

28. Draft principle 7, "Development of specific international regimes", built upon principle 22 of the Stockholm Declaration and principle 13 of the Rio Declaration and emphasized the need to conclude specific agreements concerning compensation, response measures and remedies. Irrespective of what States did at the national level to fulfil their obligations with regard to response measures and compensation, a more secure and consistent pattern of good practice would require international arrangements as well.

29. Draft principle 8, "Implementation", reaffirmed the importance of adopting legislative, regulatory and administrative measures to implement the draft principles. It also emphasized the principle of non-discrimination in their implementation.

30. The issue of international liability for injurious consequences arising out of acts not prohibited by international law had been on the Commission's agenda for more than 25 years. When it had completed the prevention aspects, the Commission had been of the view that, taking into account existing State practice, the draft articles on prevention lent themselves to codification and progressive development through a convention. In drawing up the draft principles, the Commission had focused on formulating a coherent set of standards of conduct and practice. It had not attempted to identify the current status of the various aspects of the draft principles in customary international law, and the way in which the principles were formulated was not intended to affect that question. The commentaries contained an explanation of the scope and context of each draft principle, as well as an analysis of relevant trends and possible options available to assist States in the adoption of appropriate national measures of implementation and in the development of specific international regimes. As noted in paragraph 63 of the report, in accordance with article 23 of its Statute, the Commission recommended that the General Assembly should endorse the draft principles by a resolution and should urge States to take national and international action to implement them.

31. **Mr. Duan** Jielong (China) congratulated the Commission on the adoption of the 19 draft articles on diplomatic protection. While viewing the text of the draft articles as positive on the whole, his delegation wished to emphasize that several principles should be followed in exercising the right of diplomatic protection. First, diplomatic protection was a right, not an obligation, of the State of nationality. Second, the State of nationality, in exercising diplomatic protection, must not encroach upon the territorial jurisdiction of the State where an injury had occurred and should respect its law. Third, citizens and legal persons outside their State of nationality should be primarily protected by the law of the State where an injury had occurred, with supplementary protection provided by the State of nationality; under no circumstances should protection provided by the State of nationality replace that provided by the law of the State where the injured person was located. Fourth, the State of nationality should ensure that any measures it took in exercising diplomatic protection were proportionate to the injury and should refrain from taking excessive measures. Fifth, diplomatic protection should be without prejudice to other applicable rules of international law, including those concerning consular protection, human rights protection, investment protection and the law of the sea.

32. In draft article 1, "Definition and scope", the definition rightly emphasized that diplomatic protection was to be provided against an internationally wrongful act of a foreign country. His delegation endorsed the recognition of that rule of customary international law and believed that the elements constituting an internationally wrongful act should include not only the commission of the act in violation of an international obligation but also the physical consequences caused by such an act.

33. As to draft article 4, "State of nationality of a natural person", his delegation agreed in principle with the definition that that article provided of the term "State of nationality" but noted that in international practice there were often cases of dual or multiple nationality. Many States, however, did not recognize more than one nationality, which meant that the identification of nationality must take into account the law of the States concerned other than the State of nationality. Therefore, he suggested that the following proviso should be added to draft article 4: "unless otherwise provided for in the law of the State where a natural person is located".

34. With respect to draft article 7, "Multiple nationality and claim against a State of nationality", while understanding the purpose and practical implications of the provision regarding predominant nationality, his delegation believed that there was no clear definition of "predominant nationality" in international law, and it was difficult to judge in practice. He therefore suggested that either the concept should be clearly defined or the principle of closest association should be followed in determining which State was entitled to exercise diplomatic protection.

35. Draft article 8 spelled out the conditions for diplomatic protection of a stateless person, which his delegation approved. However, as continuous nationality was a universal principle applicable to diplomatic protection of natural and legal persons, it should also

apply to stateless persons and refugees. Accordingly, he suggested that draft article 8 should be amended to provide that the exercise by a State of diplomatic protection in respect of stateless persons and refugees would be conditional on their continuous lawful and habitual residence in that State. His delegation also believed that, in determining what was to be construed as "continuous", the law of the State of current residence and universally accepted principles of international law should be taken into account along with the law of the State of legal residence of a stateless person or refugee in order to ensure that diplomatic protection would not be abused.

36. Draft article 12, "Direct injury to shareholders", was jurisprudentially problematic and required further study. First, there was no clear definition of "rights of shareholders" in international law, and such cases were very rare in international practice. Second, as protection of shareholders' interests was primarily embodied in the diplomatic protection regime in respect of their corporation, the draft article was inconsistent with the basic principles of corporate law and might easily lead to the abuse of diplomatic protection if additional protection were to be provided for shareholders over and above the diplomatic protection provided to the corporation. Third, with regard to the rights of shareholders as distinct from those of the corporation itself, the principle of diplomatic protection applicable to natural persons could be invoked, and there was thus no need for a specific provision on diplomatic protection of shareholders.

37. Since, in practice, universities that were funded and ultimately controlled by a State were a form of legal person, his delegation suggested that the following wording should be added to the commentary on draft article 13: "Universities funded and ultimately controlled by a State are also entitled to diplomatic protection".

38. As to the exceptions to the local remedies rule set out in draft article 15, to his understanding, the exception provided in subparagraph (a) covered situations in which certain matters were deemed non-actionable by the law of the State where an injury had occurred. The exception given in subparagraph (e) provided that the State alleged to be responsible for the injury had waived the requirement that local remedies be exhausted. As the waiving of that requirement would be a State act, he suggested that, to avoid any possible confusion, the wording of that subparagraph should be changed to read "the State alleged to be responsible has expressly waived..."

39. Finally, with regard to draft article 19, "Recommended practice", his delegation believed that the evolution of international human rights law had not changed the nature of diplomatic protection as a State right. The State had the right to decide whether and how to exercise diplomatic protection; there was no such thing as State obligation to exercise diplomatic protection. However, in exercising diplomatic protection, the State should take into account the rights of injured persons, including such questions as whether and how to provide injured persons with appropriate compensation.

40. Turning to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (chap. V.E) he wished to make three general comments. First, as part of the gradual development of international law in respect of State responsibility, the draft principles were of great theoretical and practical significance. Second, the application of the draft principles was general and residual in character. By "general" he meant that the draft principles were general principles to guide State practice; it fell to the States concerned to adopt by agreement concrete measures for their implementation. By "residual" he meant that, in application, particular or specific compensation arrangements would take precedence over the draft principles. Third, he supported the efforts to cast the draft principles as a declaration or a set of guidelines, or possibly a model law, not only for States to invoke and apply, but also to serve as a basis for concluding treaties in the future.

41. Regarding paragraph 1 of draft principle 4, it was his understanding that "prompt and adequate compensation" meant "fair and reasonable compensation". That was consistent both with the understanding of the purposes of the draft principles and their commentaries and with the principle of equity, reflecting the value orientation of the draft principles in striking a reasonable balance between protection of victims and protection of lawful economic activities by the relevant State.

42. Draft principle 4 established the principle of strict liability of the operator. His delegation agreed with that principle but also believed that some legal points in paragraph 2 needed to be further clarified. In particular, in the definition of "operator", "person"

should be defined as any natural or legal person. Additionally, while his delegation endorsed the imposition of primary liability on the operator, it suggested that other persons or entities that had participated in the hazardous activities should be held liable, too. The term "other person or entity" should therefore be clearly defined. Also, some exemptions should be spelled out. For example, the operator and the State of origin might be exempted from liability if, owing to force majeure, the State of origin and the operator had failed to avoid causing transboundary damage, despite having taken due diligence measures.

43. With respect to draft principle 4, paragraph 3, his delegation believed that if the operator or other person or entity could establish financial security, it would help victims to obtain fair and reasonable compensation. But establishing financial security depended, to a large extent, on the economic strength of the operator. It was still unrealistic in the current context to impose a requirement on States to make insurance available to all enterprises engaged in transboundary hazardous activities. His delegation reaffirmed its support for the allowance of "some flexibility for States", as mentioned in the commentary associated with that paragraph.

44. Draft principle 4, paragraph 4, required that, where appropriate, the State of origin should establish "industry-wide funds" for compensation at the national level. His delegation was of the view that such funds were not very common in States, especially developing States. To provide as many options as possible for transboundary damage compensation, it would suggest that an international fund should be established to cover the part of the damage which the operator's compensation was insufficient to cover, taking as a model the international funds set up to provide compensation for damage due to oil spills or nuclear incidents.

45. In connection with draft principle 4, paragraph 5, his delegation noted that some hazardous industries were currently being relocated from developed States to developing States. In such cases, it was obviously unfair to allocate residual liability for transboundary damage to the developing State alone. In his delegation's view, the State of nationality of a given enterprise and other States that benefited from its activities should share the loss in cases of transboundary damage.

46. Lastly, draft principle 6, "International and domestic remedies", spelled out different remedies, but their interrelationships were not specified. He suggested that relevant provisions should be worked out accordingly.

47. **Mr. Lammers** (Netherlands), after expressing general support for the draft articles on diplomatic protection, endorsed the Commission's recommendation that a draft convention should be elaborated on the basis of the draft articles. He reiterated his delegation's position that the clean-hands doctrine should not be included in such an exercise.

48. The Netherlands agreed with the Special Rapporteur that draft article 3 should be amended to read "the State of nationality is the State entitled to exercise diplomatic protection", as that formulation properly emphasized the bond of nationality between State and national which entitled the State to exercise diplomatic protection. With regard to draft article 5, paragraph 3, the Netherlands remained of the opinion that the wording "may not" (instead of "shall not") would be more in line with the general idea that diplomatic protection should protect against individual unfairness. Indeed, in paragraph (12) of the commentary on that article, "may not" was used in the same context.

49. With regard to draft article 8, paragraph (2) of the commentary rightly stated that the draft article was an exercise in progressive development of the law, as it departed from the traditional rule that only nationals might benefit from the exercise of diplomatic protection. The draft article was important in respect of refugees, who in most cases would otherwise be left unprotected.

50. Paragraph (4) of the commentary on draft article 14 referred to the remedies available to an alien that must be exhausted before diplomatic protection could be exercised, whereas, in earlier versions of the text, the commentary had referred to remedies that must be exhausted before a claim was brought. His delegation remained of the opinion that, in the case of diplomatic action stopping short of bringing an international claim, no prior exhaustion of local remedies was required.

51. In draft article 16, the words "under international law" should be deleted. Otherwise, the draft article might be taken to suggest that resort to national law was excluded. For example, *amicus curiae* letters, a

worthwhile instrument used in certain national jurisdictions, might be called into question.

52. His delegation firmly supported the inclusion of draft article 19 on recommended practice. Recommendatory language, though not a common feature of treaties, was not unknown. The draft article would support the position of injured individuals when they were subjected to significant human rights violations abroad.

53. Turning to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, he welcomed the completion of the text on second reading after many years of debate in the Commission. The persistence of the special rapporteurs had resulted in a text that was, in his delegation's view, conceptually well-founded in international law.

54. His Government supported the main thrust of the draft principles and agreed with the underlying notion that the question of international liability for transboundary harm could arise even in situations where a State had complied with its international obligations relating to an activity that had been carried out under its jurisdiction or control. Such situations were not currently covered by international law, and the draft principles sought to fill that gap by providing that States should take all necessary measures to ensure the availability of prompt and adequate compensation for victims of transboundary damage caused by hazardous activities. As for the necessary domestic measures to be taken, his Government generally supported the set of procedural and substantive minimum standards identified in the draft principles.

55. His Government was generally satisfied with the consideration given to its comments, in particular by the Special Rapporteur, and the resulting changes in the draft principles. The commentaries had been significantly improved on second reading. Although his Government welcomed the improved text of the draft principle on international and domestic remedies, it was still not convinced that innocent victims were entitled to compensation only for damage that was significant. The attempt by the Special Rapporteur to question the validity of his Government's arguments had not changed its view. The wish to secure equal treatment of domestic and foreign victims of a single damage-causing event, the absence of a threshold in existing special civil liability regimes and the conceptual difficulties flowing from the transposition of the threshold of damage from international relations to transnational relations continued to provide a solid foundation for his Government's conviction that a threshold of damage should not be included in the draft principles.

56. He reaffirmed his Government's position that the final form of the work on the liability aspects of the topic should not be different from that of the work on the prevention aspects. The latter had taken the form of draft articles which might be used as the basis for a draft convention. As a minimum, the obligation of States to take the necessary measures to ensure that prompt and adequate compensation was available for victims of transboundary damage caused by hazardous activities should be incorporated into the draft articles on the prevention of transboundary harm from hazardous activities. That obligation could be supplemented by guidance in the form of principles, but the obligation should be spelled out as such so as to ensure that innocent victims of transboundary damage were not left uncompensated.

57. **Mr. Nesi** (Italy), welcoming the adoption of the draft articles on diplomatic protection, said that the topic was linked to that of the articles on responsibility of States for internationally wrongful acts. In particular, article 44 on State responsibility provided that the responsibility of a State might not be invoked if the claim was not brought in accordance with any applicable rule relating to the nationality of claims or if the claim was one to which the rule of exhaustion of local remedies applied and any available and effective local remedy had not been exhausted. Those two conditions had been elaborated on in the draft articles on diplomatic protection. Moreover, draft article 1 on diplomatic protection defined diplomatic protection as consisting in the invocation by a State of the responsibility of another State.

58. The links between the two sets of articles did not necessarily imply that the General Assembly should take the same action with regard to both. However, it seemed reasonable to postpone for one year any decision on whether an international convention on diplomatic protection should be adopted, until the General Assembly had had time to consider what course of action to take with regard to the articles on State responsibility.

59. His delegation welcomed the changes to the first-reading draft that, in accordance with the thrust of its own comments, enhanced the position of the protected individual. Those changes were consonant with developments that had taken place in related areas of international law. In the specific field of diplomatic protection, the traditional view that the State of nationality exercised its own right when it took up the case of one of its subjects could no longer be upheld. The draft articles and the related commentaries indicated a more modern approach.

60. Moreover, when individuals were injured in breach of an international obligation, they were not necessarily confined to the possibility of requesting diplomatic protection. Draft article 16 was therefore important as a reminder that diplomatic protection did not exclude resort to other forms of protection that might exist under international law. The reference to States in that article might give rise to ambiguity; it had to be read in the context of the commentary with regard to the invocation of responsibility by States other than the State of nationality when the obligation breached was owed to the international community as a whole or to a group of States. The latter case might involve an obligation under a human rights treaty to which both the responsible State and the claimant State were parties.

61. While the draft articles provided for diplomatic protection of refugees by a State other than the State of nationality, the conditions set out in draft article 8 greatly limited the scope of that innovation. Only in a few cases would the requirement that the refugee should be lawfully and habitually resident in the claimant State be met, particularly given the way in which the rule of continuity of nationality had been transposed to apply to refugees.

62. With regard to corporations, the changes to the first-reading text of draft article 9 could also be regarded as innovative in respect of existing international law. The new text provided a solution which was clearer than the one previously outlined by the Commission and avoided the risk of multiple claims in relation to a single injury affecting one corporation.

63. He welcomed the adoption, after many years of discussion, of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. They provided a useful list of the issues involved and of the measures that needed to be taken in order to protect potential victims, whether States or natural or legal persons. Draft principle 4 rightly emphasized the obligation of the operator to provide compensation, but it also provided for alternative solutions and, moreover, required that, if the various measures taken were insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources were made available.

64. As mentioned in draft principle 7, the principles would probably need to be implemented through global, regional or bilateral agreements with regard to particular categories of hazardous activities. However, the adoption of principles in a non-binding form, as suggested by the Commission, would be a useful step towards protecting those who suffered damage from hazardous activities.

65. *Mr. Onisii (Romania), Vice-Chairman, took the Chair.*

66. **Mr. Trauttmansdorff** (Austria) welcomed the adoption on second reading of the draft articles on diplomatic protection and the draft principles on international liability. With regard to the former, his delegation was not convinced that work on the elaboration of a convention should start immediately, as recommended by the Commission. The text that had been adopted on second reading had been elaborated in a relatively short time. It would therefore be beneficial for States to have time to digest it before coming to a conclusion on the most appropriate procedure. His delegation would prefer that the General Assembly should take note of the draft articles and place the item on its agenda again in a few years' time, so that the possibility of elaborating a convention by establishing an ad hoc or preparatory committee or convening a codification conference could be considered.

67. One issue that might need to be taken into account was the fact that the definition in draft article 1, which referred to the exercise of diplomatic protection only on behalf of nationals of a State, seemed inconsistent with draft article 8, which envisaged the possibility of a State exercising diplomatic protection in respect of persons other than its own nationals, such as stateless persons and refugees. Draft article 1, as it stood, might be taken to mean that invocation of the responsibility of a State by a State other than the State of nationality would not be

a case of diplomatic protection. That meaning was certainly not intended; the text might, therefore, need to be redrafted.

68. Draft article 15 might also require further consideration. The addition of paragraph (d), which stated that local remedies did not need to be exhausted where the injured person was manifestly precluded from pursuing local remedies, was reasonable, although the commentary rightly referred to the *lex ferenda* nature of the provision. In the modern world, where the rights of an individual could be affected even if that individual was at a great distance from the State committing the injury, the requirement to exhaust local remedies could raise insurmountable obstacles, even if the situations described in paragraphs (a) to (c) were not applicable. However, it was still necessary to consider whether the wording excluded a possible misuse of the exception in question.

69. His delegation supported the recommendation that the General Assembly should adopt a resolution endorsing the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. States should take the draft principles into account as recommendations when taking measures at the national and international levels.

70. However, the current text of the draft principles still contained a number of points that required further clarification. In draft principle 4, paragraph 1, it was not clear whether States were being requested to ensure compensation only for victims outside their territory or also those within their territory. In paragraph 2, the last sentence might need further clarification with regard to the scope of draft principle 3. Draft principle 4, paragraph 5, should be reconsidered in the light of the "polluter-pays" principle. In draft principle 5, paragraph (b), it remained unclear what kind of response measures were to be taken. The term "appropriate" did not add much clarity. Lastly, draft principle 8, paragraph 1, should be understood to mean that the draft principles were to serve as guidance to States when they adopted rules on liability at the national or international level.

71. The topics to be included in the long-term programme of work of the Commission should be chosen carefully in accordance with the selection criteria determined by the Commission, in particular the real needs of the international community in respect of codification and progressive development in a given area of international law. Those needs should be considered with a view to appropriate delimitation of the scope of the proposed topic.

72. His delegation supported the inclusion of the topic "Jurisdictional immunity of international organizations". As a host country of the United Nations and other international organizations, Austria believed that the practice of States in that field required harmonization. National courts needed more legal certainty when ruling on the immunity of international organizations. The inclusion of that topic would supplement the Commission's work with regard both to immunity and to international organizations. There was also some merit in considering the topic "Immunity of State officials from foreign criminal jurisdiction", which had recently come before the International Court of Justice on a number of occasions. The time seemed ripe to take stock of present practice and attempt to elaborate general rules on the subject.

73. With regard to other topics that had been proposed — "Protection of persons in the event of disasters", "Protection of personal data in transborder flow of information" and "Extraterritorial jurisdiction" — the Commission should carry out further preliminary studies, analysing the topics in the light of the above-mentioned selection criteria before deciding whether to include them in the work programme. Austria welcomed the preliminary analyses carried out by the Secretariat and contained in annexes C, D and E to the Commission's report. The analysis of the topic "Protection of personal data in transborder flow of information" showed the high level of interest of the increasingly globalized world in codification and progressive development of the international rules in that area. However, the question remained as to whether State practice in that field was as yet sufficiently consolidated in relation to ongoing rapid technological development. As to "Extraterritorial jurisdiction", because of its potential width, delimitation of the topic's scope was of paramount importance.

The meeting rose at 1.10 p.m.

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Held at Headquarters, New York, on Wednesday, 25 October 2006, at 10 a.m.

Chairman: Mr. Gómez Robledo .... (Mexico)
later: Mr. Ganeson (Vice-Chairman) .... (Malaysia)
later: Mr. Gómez Robledo .... (Mexico)

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The meeting was called to order at 10.05 a.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. Tajima** (Japan) said, with reference to the draft articles on diplomatic protection adopted on second reading, that the Commission had taken the correct course in not using the genuine-link criterion in determining whether there was a tie of nationality between the injured person and the State exercising diplomatic protection, since the criterion could be difficult to apply in an age when the activities of many corporations and individuals extended over several States. However, the predominant-nationality criterion used in draft article 7 in the case of dual or multiple nationality was not supported by sufficient precedent, and the factors enumerated in the commentary for determining which nationality was predominant might not be decisive.

2. His delegation understood the Commission's purpose in drafting articles on diplomatic protection of stateless persons and refugees, since it was fully aware of the importance of extending protection to such persons. However, since the role of the Commission was to pursue the codification and progressive development of international law, perhaps it should not have the additional burden of proposing articles *de lege ferenda.* In that regard, his delegation was pleased that the Commission had emphasized the discretionary nature of the right of States to exercise diplomatic protection.

3. With regard to the protection of ships' crews, the Commission had rightly stated the difference between the diplomatic protection of crew members by their State of nationality and the right of the State of nationality of a ship to seek redress on behalf of such crew members. However, in an actual case, the wording might cause difficulty when it came to coordinating competing claims.

4. Concerning draft article 19 on recommended practice, his delegation had doubts about the statement in paragraph (3) of the commentary that support was growing for the view that there was some obligation on States to protect their nationals abroad when they were subjected to significant human rights violations. It had concerns about the implication of the clause, which represented neither codification nor progressive development and might change the nature of the draft articles.

5. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), his delegation was pleased that the Commission, in adopting the draft principles on the allocation of loss arising out of hazardous activities, had addressed the issue with maximum generality, in a not overly ambitious way, and had completed its task within the limits of its role of codification and progressive development. It was appropriate for the final outcome to take the form of a set of principles, which should serve as useful guidelines for States dealing with issues related to hazardous activities that had the potential to cause transboundary damage.

6. With regard to the proposal that the Commission should once again take up the topic of most-favoured-nation clauses, it was true that such clauses played a significant role in the economic activities of the international community, and it was regrettable that the General Assembly had taken no action on the draft articles adopted by the Commission in 1978. However, his delegation had some doubts about the wisdom of reopening debate on the topic, since the development of international economic and investment law was progressing well in specific forums.

7. **Mr. Tladi** (South Africa) said that his Government supported the work of the Commission on diplomatic protection, particularly the principle set out in draft article 2 that the right to exercise diplomatic protection under international law was vested in the State. The State was under no obligation in international law to exercise that right, however, and draft article 19 therefore gave cause for concern, particularly in view of the commentary, which invoked the possibility of such an obligation. Although it was couched in non-peremptory language, draft article 19 could give the impression that States were required to exercise diplomatic protection and that the nationals concerned had the right to determine the nature of that protection. He therefore expressed the hope that draft article 19 would be excluded from the set of draft articles, while stressing that it was the consistent practice of his country to respond to legitimate requests for diplomatic protection from its nationals abroad.

8. In connection with chapter V, he said that the draft principles advanced international law, in respect not only of the environment but also of sustainable development. While it might be a departure from a traditional principle of law to hold the operators of hazardous activities not prohibited by law accountable for the attendant risks, it was indeed consistent with the principle of sustainable development and the notion of integration. As for the wide definition of damage to include damage to the environment, his delegation supported it, even though it might entail difficulties in terms of quantification and identification of victims and therefore called for creative solutions. Draft principle 6, which provided a foundation for the enforcement of claims, also required more work, some of which was already reflected in the Special Rapporteur's third report (A/CN.4/566), where various options were considered for preventing multiple claims. He noted, lastly, that the draft principles did not address the important issue of limitation, or even exclusion, of liability of the operator as a consequence of the conduct of the victim or a third party. As was clear from paragraph 30 of the third report, it was not only logical but also generally accepted that the draft principles should provide for such limitation or exclusion, according to the circumstances.

9. **Mr. Mársico** (Argentina) said that the draft articles on diplomatic protection adopted by the Commission were comprehensive, objective and balanced. The Commission not only had codified the conditions for the exercise of diplomatic protection in accordance with customary practice but also had found correct solutions for some questions of progressive development. In general, his delegation was in agreement with the content of the draft articles. It supported the approach of treating diplomatic protection as one of the traditional means of invoking the responsibility of a State for a wrongful act and hence agreed with the definition of diplomatic protection in draft article 1, which placed the draft articles in the broader context of State responsibility. Draft article 2 captured another fundamental element by reserving to the State of nationality the discretionary power to decide whether and how to exercise diplomatic protection, in keeping with the general aims of its foreign policy.

10. With regard to draft article 5, which dealt with the prerequisite of continuous nationality, the Commission had wisely decided that, if nationality was established both at the date of injury and at the date of the official presentation of the claim, it could be presumed to be continuous between those dates. Argentina also supported the innovative text proposed by the Commission in draft article 8 regarding the extension of diplomatic protection to stateless persons and refugees and considered it a progressive development of international law which was justified in view of the precarious legal status of such persons. The prerequisite of exhaustion of domestic remedies, especially the statement of exceptions to the general rule in draft article 15, was handled well. Lastly, although the concept of "recommended practice" did not, strictly speaking, belong in a set of operative articles, his delegation nonetheless understood the purpose of draft article 19 and supported its inclusion.

11. With regard to the Commission's recommendation that the draft articles should be the basis for the elaboration of a convention, his delegation supported in principle the adoption of a binding instrument. However, it agreed with other delegations on the advisability of taking time for further reflection and the need to link the draft articles with the articles on responsibility of States for internationally wrongful acts.

12. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation considered the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities to be a positive contribution to the development of international law, one that should guide States in the formulation of laws and regulations and in the conclusion of bilateral and multilateral treaties in that area. It should be seen in the context of the other sets of articles on international responsibility, namely, the articles on responsibility of States for internationally wrongful acts and the parallel draft articles still being elaborated on responsibility of international organizations, and, of course, in conjunction with the articles on the prevention of transboundary harm caused by hazardous activities.

13. His delegation was in basic agreement with the conceptual approach and the content of the draft principles, in particular the principle that the innocent victim should not be left to bear the loss from transboundary harm caused by non-prohibited hazardous activities despite preventive measures; the need to preserve and protect the environment; the

obligation of each State to take all necessary measures to ensure prompt and adequate compensation for victims; the primary and strict liability of the operator; non-discriminatory access to redress and remedies; and the establishment of mechanisms such as insurance or funds to finance compensation. Moreover, in the development of specific international regimes, the question of the concurrent or supplementary liability of the State of origin of the hazardous activity and of the harm should be addressed.

14. His delegation agreed with the representative of the Netherlands that the final form of the work should be consistent with the final form of the articles on prevention submitted by the Commission in 2001. It favoured the elaboration of a convention encompassing not only the duty of prevention but also the duty to take measures to ensure compensation for victims of transboundary harm arising out of hazardous activities not prohibited by international law, along the lines of the draft principles.

15. *Mr. Ganeson (Malaysia), Vice-Chairman, took the Chair.*

16. **Mr. Fife** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Sweden and Norway) said that the end result of the Commission's work on diplomatic protection struck a good balance between codification and the progressive development of international law. The Nordic countries were generally pleased with the completed set of draft articles. They supported the approach reflected in draft article 2, based on the premise that States had a right, not a duty, to exercise diplomatic protection. It was also important to underline that the rules of diplomatic protection were without prejudice to the law of consular protection and other applicable rules of international law, including those pertaining to the law of the sea.

17. With regard to draft article 5, which made continuity of nationality a requirement for the exercise of diplomatic protection, the Nordic countries supported the approach taken by the Commission whereby a State was entitled to exercise diplomatic protection in respect of a person who had been its national at the time of the injury and was its national at the date of the official presentation of the claim, since the date of the resolution of the claim, a common criterion, was often difficult to determine, and they supported the use of the same solution in draft article 10 with regard to corporations. In addition, the exception in draft article 10, paragraph 3, allowing the exercise of diplomatic protection even if the corporation had ceased to exist, provided that it was as a result of the injury, appeared to be sound. The Nordic countries strongly supported the approach taken by the Commission in draft article 7, whereby, in the case of multiple nationality, the State of nationality that was "predominant", at both the relevant times, should be entitled to exercise diplomatic protection against another State of nationality of the person concerned, considering that it constituted a codification of existing customary international law.

18. The Nordic countries were particularly pleased that the draft articles included a provision on diplomatic protection on behalf of stateless persons and refugees. Draft article 8, paragraph 2, provided that a State could exercise diplomatic protection in respect of a person recognized as a refugee by that State "in accordance with internationally accepted standards". While pleased that the commentary explained that the term "refugee" was not limited to the definitions in the 1951 Convention relating to the Status of Refugees and its Protocol, the Nordic countries would have preferred the even greater flexibility provided by the previous formulation in the commentary whereby a State might extend diplomatic protection to any person that it considered and treated as a refugee, in other words, a person who fulfilled the requirements of territorial connection to the State exercising diplomatic protection and who in the judgement of the State was clearly in need of protection without necessarily being recognized as a refugee according to internationally accepted standards. Moreover, the temporal requirement of lawful and habitual residence at the time of injury and at the date of the official presentation of the claim set too high a threshold. In many cases where there was a need for effective diplomatic protection, the injury would have occurred prior to the entry of the person concerned into the territory of the State exercising diplomatic protection. The Nordic countries would have preferred a criterion of lawful stay, which was used in article 28 of the Convention relating to the Status of Refugees in connection with the issuance of travel documents.

19. With regard to the exercise of diplomatic protection on behalf of shareholders, the Nordic countries were satisfied that the Commission had ensured overall consistency with the case law of the

International Court of Justice, in particular the *Barcelona Traction* case. In draft article 18, the Commission had reaffirmed the very important principle that the right of the flag State to seek redress on behalf of crew members did not exclude the right of the State of nationality of the crew members to exercise diplomatic protection, and vice versa, so that the important protective measures established by the law of the sea were not undermined.

20. The provisions of the new draft article 19 recommending that a State should give due consideration to the possibility of exercising diplomatic protection and should take into account the views of the injured persons appeared to be reasonable and consistent with draft article 2. The recommended practice in paragraph 3, whereby a State should transfer to the injured person any compensation obtained for the injury, subject to reasonable deductions, also seemed fair. Lastly, the Nordic countries believed that the elaboration of a convention on the basis of the draft articles, as recommended by the Commission, could enhance legal clarity and predictability in the field of diplomatic protection.

21. **Mr. Witschel** (Germany) said that the draft articles on diplomatic protection were an important complement to the articles on responsibility of States for internationally wrongful acts, since the rules on diplomatic protection set out one possible legal framework in which such responsibility might be invoked, established and implemented. Since they constituted only one framework among others, draft article 16 rightly made it clear that they did not affect other procedures under international law for securing redress.

22. Germany supported the legal position expressed in draft article 2 that the exercise of diplomatic protection constituted a right, not a duty, of States. The recommendation in draft article 19, subparagraph (a), that States should give due consideration to the possibility of exercising diplomatic protection did not detract from the principle, since it was clearly stated in the commentary that the recommended practices in draft article 19 had not acquired the status of customary rules and were not susceptible to transformation into rules of law in the exercise of progressive development of the law. Even at the national level, where a State might, under its own constitution, be under an obligation to exercise diplomatic protection in favour of its nationals, it still had a wide margin of discretion in deciding how to comply with that obligation.

23. His delegation approved the definition of the State of nationality of a natural person, which was premised on the right of the State to set the conditions for the acquisition and loss of its own nationality and provided a useful but by no means comprehensive list of the ways of acquiring nationality. The Commission had been wise not to include the genuine-link test applied by the International Court of Justice in the *Nottebohm* case, since that case had been exceptional even at the time, and in the current world of migration and globalization to apply the genuine-link test could cause hardship to millions of persons who did not possess the nationality of their host States.

24. On the whole, Germany agreed with the rules adopted by the Commission for the diplomatic protection of legal persons, whereby the State of nationality was the State under whose law the corporation had been incorporated, unless a clearly stated set of conditions applied cumulatively. The decision not to allow the State of nationality of shareholders in a corporation to exercise diplomatic protection had the legitimate aim of avoiding overlapping claims by two or more States. However, his delegation considered that the exceptions to that rule provided for in draft article 11 were too narrow: there might be other situations in which it would be unfair or inappropriate to refuse the State of nationality of a shareholder the right to exercise diplomatic protection, for example, where the State of nationality of the corporation was unable or unwilling to act on behalf of the shareholders.

25. His delegation thought that it would be wise to omit subparagraph (c) of draft article 15, which allowed an exception to the local remedies rule where there had been no relevant connection between the injured person and the State alleged to be responsible at the date of injury. The criterion of "relevant connection" was very vague, and it was doubtful whether the exception was sufficiently established in State practice and case law to be included in the draft articles at the current juncture.

26. With regard to the newly introduced draft article 19 on recommended practice, it was inappropriate to include a set of recommendations in a draft text meant to serve as the basis for the elaboration of a convention intended to regulate the rights of one State vis-à-vis

another State and not the rights of individuals. Draft article 19 in its present form should therefore be deleted. The commentary to the draft article contained a pertinent analysis of the state of the law and of the reasons for change and could be incorporated in the commentary to draft article 2.

27. It appeared that the draft articles were not yet ripe for immediate adoption in the form of a convention. States should be given more time to study the text and comment on it. His delegation would therefore support the proposal that the General Assembly should merely take note of the draft articles at its current session and postpone a decision on how to proceed further to a later date.

28. **Mr. Bellinger** (United States of America) expressed his Government's appreciation for the central role and important contribution of the International Law Commission in the progressive development and codification of international law.

29. His delegation did not consider it advisable to adopt a binding instrument on diplomatic protection, since the draft articles deviated from settled customary international law on only a limited set of issues and did not therefore warrant the holding of an international conference. Those draft articles had only recently become available and Governments needed time to study them more carefully. Pending a fuller review, the United States welcomed the changes made in the draft articles in the past year to reflect customary international law more accurately, together with the clarifications provided by the commentary. It was useful that paragraph (8) of the commentary to draft article 1 made it clear that diplomatic protection did not include demarches or other diplomatic action not involving invocation of the legal responsibility of another State, such as informal requests for corrective action. He expressed satisfaction at the reaffirmation in paragraph (2) of the commentary to draft article 2 that a State was under no obligation to exercise diplomatic protection and that the question of whether to do so was its sovereign prerogative.

30. While it was fitting that the principle of continuity of nationality should be treated in draft articles 5 and 10, and by implication in draft articles 7 and 8, as a prerequisite to the exercise of diplomatic protection on behalf of natural and corporate persons, those draft articles diverged inappropriately from customary international law in not extending that requirement beyond the date of official presentation of the claim to the date of resolution, except in specific cases. The customary international law rule, as most recently articulated in *The Loewen Group Inc. v. United States of America*, was that there must be a continuous national identity from the date of the events giving rise to the claim to the date of resolution of the claim. His delegation welcomed the restatement in draft article 12 of the customary international law rule that a State of nationality of shareholders could exercise diplomatic protection on their behalf when they had suffered direct losses; it did not consider, however, that the two exceptions to the rule set out in draft article 11 reflected customary international law. On the question of exhaustion of local remedies, addressed in draft article 14, his delegation took the position that they did not need to be exhausted in cases where they were futile or manifestly ineffective, and it viewed favourably the stipulation in paragraph (4) of the commentary to draft article 15 (a) that the test was whether the municipal system of the respondent State was reasonably capable of providing effective relief.

31. The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities were a positive step towards encouraging States to ensure prompt and adequate compensation for victims of transboundary harm in that they incorporated progressive ideas; it was important to take the necessary measures to put them into effect. It was appropriate that the draft principles should take the form of non-binding standards, as they were innovative and aspirational in character rather than descriptive of current law or State practice. The General Assembly should not take action to convert them into a convention.

32. With regard to the new topics proposed, his delegation commended the Commission and its secretariat for focusing on real-world problems. It hoped that the topic on protection of persons in the event of disasters would be quickly moved to the Commission's agenda for active consideration and that, rather than employ a rights-based approach, the Commission would focus on the development of concrete legal tools. As for the topic on protection of personal data in transborder flow of information, he questioned whether it met the Commission's criteria for consideration, noting that it still raised significant political and policy issues.

33. **Ms. Banks** (New Zealand) said that the strengthening of international law was a plank of New Zealand's foreign policy and that her country strongly supported the work of the Commission. She paid particular tribute to three outgoing Special Rapporteurs and agreed with the suggestion that the question of honorariums for them should be reconsidered.

34. The traditional role of the Commission was changing and would need to continue to be adapted to the challenges of the changing international environment. The Commission should not shy away from innovative working methods and different products for its work, for which it might require increased use of external expertise.

35. The draft articles on diplomatic protection adopted on second reading represented a balanced product which incorporated a mix of codification and sensible progressive development. It was wise to widen the limited exception in draft article 11 (b) to the *Barcelona Traction* rule on the nationality of corporations; that would enable the State of nationality of shareholders to protect them in cases where the requirement to incorporate in a State was a compulsory condition for doing business in that State, even if it was not prescribed by law. She welcomed the clarification in paragraph (9) of the commentary to draft article 1 that diplomatic protection did not include demarches or other diplomatic actions not involving invocation of the legal responsibility of another State, as most allegations of injury through wrongful State action would be resolved via the diplomatic channel and not through the lodging of a formal legal claim. With regard to draft article 19, it was indeed appropriate to recommend that a State exercising diplomatic protection should transfer to its injured national any compensation obtained, subject to reasonable deductions.

36. The topic of international liability in relation to transboundary harm had long been of interest to New Zealand: the risk of such harm from hazardous activities had grown in relevance over the 25 years of the Commission's work and would continue to do so as a result of emerging technologies. Harm was a key issue, but the question also needed to be addressed of who should bear liability for loss in circumstances where, despite prevention measures, loss still occurred. The draft principles struck a reasonable balance between the rights and interests of the operator of the hazardous activity and the State authorizing it, on the one hand, and those of the victims of transboundary harm resulting from such activity, on the other. The principles were general and residual in nature and would help fill a significant gap in the international legal order. She supported the Commission's recommendation that the General Assembly should endorse the draft principles in a separate resolution and that it should urge States to take national and international action to implement them.

37. **Mr. Kessel** (Canada) said that the work of the International Law Commission combined intellectual rigour with profound knowledge and that Canada had benefited greatly from it. His delegation particularly appreciated the attention given by the Special Rapporteur for the topic "Diplomatic protection" to the confusion between diplomatic protection and consular assistance. The distinction between diplomatic and consular functions was an important legal one, but it was no longer always clearly embodied in a structural division between diplomatic and consular services: much consular work was done by diplomats. He hoped that the draft articles would make that distinction clearer.

38. Some confusion had also been created by the terms of draft article 7 in another area of consular law. It had thus been suggested that primary rules of international law, such as those linked to the obligation to notify foreign nationals of their right to contact their consul, should be interpreted in the light of the concept of predominant nationality outlined in that draft article. However, that concept did not lend itself to defining the primary obligation to give consular notice to foreign nationals. It would be useful if the commentary addressed the issue so as to avoid confusion.

39. The draft articles would be extremely useful to the international community in their current form and did not, for the time being, need to be transformed into a treaty.

40. **Mr. Bethlehem** (United Kingdom) said that his country was a strong supporter of the Commission and welcomed the flexibility of its approach as reflected in the final form taken by the products of its work, whether a convention or draft articles, as deemed appropriate. Its work was not incomplete when it did not result in a convention, as had been suggested in some quarters. The articles on State responsibility, for example, had played a very positive role in the development of the law in that area. As for its working

methods, it was appropriate that the Commission's efforts towards the codification and progressive development of international law should be pursued in close consultation with States, cumbersome though that might be.

41. Turning to the draft articles on diplomatic protection, he emphasized that it was a cardinal principle in that regard that the exercise of such protection was a matter for the discretion of the State. His delegation welcomed the inclusion in draft articles 5 and 10 of the presumption of continuity of nationality, which remained rebuttable. In those draft articles there was, however, some inconsistency in the approach with regard to natural persons and legal persons on the question of changes in nationality, which merited further consideration. In respect of draft article 8, his delegation maintained its position that the protection of stateless persons and refugees did not come within the scope of diplomatic protection as currently understood in international law. His Government regarded the provisions of that draft article as *lex ferenda* and, while it might, at its own discretion, take action on behalf of such persons, that would not *stricto sensu* be an exercise of diplomatic protection and would not reflect the status or prospective status of the individual concerned. The reference to draft article 8 in draft article 3, paragraph 2 was likewise not in accordance with customary international law.

42. His delegation welcomed the changes made in draft articles 9 to 13 and agreed with the Commission's commentary that draft article 15 (d) was an exercise in progressive development. As to the new draft article 19, its inclusion was inappropriate, particularly if the draft articles were to be adopted as a convention. There was a risk that the suggestion in draft article 19 (a) that States should give due consideration to the possibility of exercising diplomatic protection could undermine the well-established principle of customary international law that the right to exercise diplomatic protection was purely discretionary.

43. The Commission's recommendation that the draft articles should form the basis for a convention might well open up the debate on the draft articles and thereby jeopardize the important work of consolidation and commentary already undertaken. It would be beneficial for the further development of the law in that area if States were given time to acquaint themselves with the draft articles and draw on them in their current form. Moreover, it would be premature to determine that the draft articles should form the basis of a convention so long as there was no consensus that the articles on the responsibility of States for internationally wrongful acts, to which they were closely related, should be elaborated in treaty form.

44. He welcomed the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The Commission had wisely concluded that the draft principles should be presented in non-binding form as, given their general and residual nature, it would be inappropriate for them to create legal obligations for States. In several respects, they did not represent customary law and were too broadly stated to constitute a desirable direction for *lex ferenda*. Although, in the future, States might have regard to the draft principles when considering issues concerning liability for transboundary harm, the nature of the subject matter was such that States must apply the draft principles in a flexible manner, while bearing in mind the existence of a variety of national legislative systems.

45. **Ms. Goldsmith** (Australia) said that the International Law Commission's considerable achievements over the past year were a testament to its members' dedication, commitment and hard work.

46. The draft articles on diplomatic protection would complement the Commission's work on State responsibility for internationally wrongful acts. The issue of diplomatic protection was of importance to her Government, which was committed to providing appropriate consular services for the large number of Australians who were overseas. While consular assistance was largely preventive, diplomatic protection offered a potential remedy for harm ensuing from an internationally wrongful act.

47. The Commission had brought a welcome contemporary perspective to the topic, which balanced the two components of its mandate, namely the codification and progressive development of international law. On the one hand, the commentary to draft article 4 indicated that the genuine-link requirement established by the International Court of Justice in the *Nottebohm* case needed to be understood in the context of the particular facts of the case and was not more widely applicable. As the commentary to draft article 6 noted, dual or multiple nationality was a

fact of international life. The draft articles reflected that reality.

48. The exercise of diplomatic protection was indeed a right, rather than a duty, of a State. The diplomatic protection of a ship's crew by the flag State was an issue adequately covered by existing international law and there was no need to address it in the draft articles. Draft article 17 was welcome since, in effect, it provided that special rules of international law, including those contained in bilateral or multilateral treaties on the protection of investments, prevailed over the general rules elaborated in the draft articles.

49. It would be preferable not to use the draft articles as the basis for a new convention on diplomatic protection, because their substance might be diminished in the course of negotiations between States. Moreover, the treaty on the subject might not be universally ratified, a situation which would give rise to "reverse codification". As they stood, the draft articles represented a sensible mix of codification and progressive development and were a suitable basis for a General Assembly declaration.

50. The eight draft principles which the Commission had adopted on the allocation of loss in the case of transboundary harm arising out of hazardous activities also combined codification with the progressive development of international environmental law. The Commission had sensibly avoided the difficulties of trying to harmonize national laws and legal systems. States should reflect on the draft principles for a while before a collective stance was taken.

51. **Mr. Kim** Sun Pyo (Republic of Korea) said that one of the crucial functions of a modern State was to protect its nationals abroad. The growth of individuals' activities in the economic, social and cultural fields had brought with it a widening of the span of States' protective action. In addition, the development of international human rights standards had called for the extension of States' protection to non-nationals, such as stateless persons and refugees.

52. While generally endorsing the draft articles on diplomatic protection presented in the seventh report on the subject (A/CN.4/567), he emphasized with respect to draft article 5, paragraph 3, that, on attaining independence, a former colony should be able to exercise diplomatic protection on behalf of its nationals who had been nationals of the former colonial Power, vis-à-vis the latter, with regard to an injury caused by it before independence. That point should be formulated as an exception to the general rule.

53. Concurring with the representative of the United Kingdom that it was a general rule of international law that a State would not support a claim of a dual national against another State of nationality, he drew attention to the fact that confirmation of that rule was to be found in the case law of international courts.

54. With reference to draft article 11, the Special Rapporteur had asserted that the most fundamental principle of the diplomatic protection of corporations was that a corporation was to be protected by the State of nationality and not by the States of nationality of the shareholders in a corporation. That principle had been affirmed by the International Court of Justice in the *Barcelona Traction* case, but the Court's ruling had provoked widespread criticism from many distinguished jurists, including some of the Court's judges, who had held that the shareholders should not have been denied their right under international law. Moreover the jurisprudence of international arbitral tribunals in cases concerning the diplomatic protection of corporations had upheld the right of shareholders in a corporation to request the diplomatic intervention of their own State. Draft article 16, which dealt with actions or procedures other than diplomatic protection, was inappropriate and redundant.

55. Turning to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, he commented that, while draft principle 2 reflected the content of recent international treaties on the subject, it was unclear what qualified as "significant damage" and who was to decide that issue. Article I (k) of the 1963 Vienna Convention on Civil Liability for Nuclear Damage as amended by the 1997 Protocol offered a solution in that it laid down that each damage was to be determined by "the law of the competent court". Moreover the notion of "environment" was rather broad, and it therefore raised concerns that it might trigger a flood of claims for damages. It was also unclear whether the liability to be imposed under draft principle 4, paragraph 2, was strict or absolute liability. If strict liability was intended, there was no need to enumerate causes of exoneration.

56. It emerged from draft principle 4, paragraph 5, that States were residual and subsidiary compensators whose responsibility it was to ensure that adequate

compensation was available. Yet States could play an active role in launching space vehicles or running nuclear power plants and could therefore themselves incur liability to pay compensation. Draft principle 6 would not prevent victims from forum shopping, since it allowed the concurrent jurisdiction of the State of origin, the State where the injuries had occurred and the State of nationality of the victims. It might lead to disputes among States, especially when there was considerable discrepancy between the damages which could be awarded.

57. **Mr. Dinescu** (Romania) said that the draft articles on diplomatic protection were broadly in line with the approach advocated by his Government. Draft article 2, read in conjunction with draft article 19, made the exercise of diplomatic protection a right and not an obligation of a State, although the latter was encouraged to avail itself of that right. Such an interpretation constituted substantial progress in the matter. The combination of those two articles offered the best possible solution as it safeguarded the sovereign right of a State to exercise diplomatic protection and took account of the need to keep pace with developments in international practice, which tended to make it incumbent on States to engage in such action.

58. As the commentary to draft article 5, paragraph 2, suggested, it was necessary to guard against a person deliberately changing his or her nationality in order to acquire a State of nationality more willing and able to bring a claim on his or her behalf, if exceptions to the continuous nationality rule were allowed in favour of persons who had the nationality of the claimant State solely on the date of the official presentation of the claim. Draft article 5, paragraph 2, was designed to avoid such a risk. Although it was clear from the commentary that the International Law Commission intended to limit exceptions to the continuous nationality rule to cases involving compulsory imposition of nationality, it was questionable whether the current wording of draft article 5, paragraph 2, supported such a strict limitation. In other words, it was not obvious whether the condition laid down by that paragraph could be equated with the compulsory imposition of a new nationality or whether, on the contrary, it permitted a wider application of the exception. It would be hard to contain the broader application by making it subject to the sole condition that the new nationality had to be acquired for a reason unrelated to the bringing of the claim, since that proviso was subjective in nature, and it would therefore be difficult to prove non-compliance, except in cases of flagrant abuse. Draft article 8 was in keeping with developments in international practice regarding the extension of diplomatic protection to stateless persons and refugees.

59. While his Government was in favour of adopting a convention on diplomatic protection, it also subscribed to the view that some time would be required for an in-depth analysis of the subject so as to permit the adoption of a truly universal legal instrument.

60. As for chapter V, International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), the Commission's proposal that the General Assembly should adopt a resolution endorsing the eight draft principles on the allocation of loss in the event of transboundary harm arising out of hazardous activities would lay the foundations for closer cooperation among States. To that end, it might be advisable to expressly encourage the conclusion of comprehensive bilateral or regional agreements in that field, rather than agreements on specific categories of hazardous activities, as suggested in draft principle 7.

61. The Commission had rightly concluded that it would be judicious to present articles in the form of draft principles, because such an instrument would not then have to be harmonized with national laws and legal systems, but would nevertheless result in the recognition of certain unanimously accepted objectives, such as the dual need to secure prompt and adequate compensation for victims and to mitigate environmental damage. While the first objective had been a constant concern of the Commission from the outset, the second mirrored the more recent acknowledgment on the part of the international community that environmental protection was of value in itself. Everyone knew that it was vital to balance development requirements against the need to conserve ecosystems, but that was an extremely delicate issue when projects had a transboundary impact with possibly adverse consequences making it necessary to ensure that any victims would receive adequate compensation.

62. The inclusion of environmental protection among the objectives of the draft principles was to be welcomed in the hope that it might prompt States to pay greater heed to the environment. The set of draft principles proposed by the Commission might provide some essential guidance for international practice. They should be duly taken into account in a world where the risks of transboundary harm were proliferating. At the same time, the proposed rules were flexible enough to cater for the diversity of national legal systems. Paragraphs 1 and 2 of draft principle 4 introduced a fair approach ensuring that the operator was liable for paying prompt and adequate compensation to the victim. The operator's liability was predicated on the polluter-pays principle but, at the same time, the State in which hazardous activities took place had to take the necessary measures to give effect to that liability. As the Commission had acknowledged, the aim was to make sure that liability was channelled primarily to the operator without exempting States from their preventive obligations under international law. The adoption of the principle of the operator's objective liability would secure adequate protection of victims.

63. *Mr. Gómez Robledo (Mexico) resumed the Chair.*

64. **Mr. Serrades Tavares** (Portugal) welcomed the completion of the International Law Commission's work on the topics of diplomatic protection, international liability, unilateral acts of States and fragmentation of international law and hoped that it would soon finalize its deliberations on the subjects of shared natural resources and reservations to treaties.

65. Turning to chapter XIII of the report (A/61/10), he said that the topic "Immunity of State officials from foreign criminal jurisdiction" was most appropriate for codification and progressive development. It was doubtful whether the other subjects proposed for consideration by the Commission were ripe for codification, were suitable topics for the Commission, or would add much to work already done. It was necessary to achieve a balance between the desirability of enriching international law and securing a successful outcome of the Commission's studies.

66. As far as the Commission's methods of work and its interaction with the Sixth Committee were concerned, although some practical and highly commendable steps had been taken to revitalize the debate on the Commission's report, the interactive debates with Special Rapporteurs had proved less successful. Chapter III concerning specific issues on which comments would be of particular interest to the Commission tended to deal with peripheral questions. The Commission did not have an opportunity to give adequate consideration to the statements made by Member States in the Sixth Committee. It was therefore all the more urgent that those points should be addressed informally with the Commission and its members. The Commission was like an architect; it had to be allowed some creativity when planning a house, but it could not ignore the wishes of its clients (the States) which would have to live in it. The provision of further opportunities to reflect on means of improving the Commission's relationship with States would therefore be welcome.

67. The institution of diplomatic protection was crucial to contemporary international relations. The draft articles adopted by the Commission offered a suitable basis for an international convention, but their scope should be confined to matters falling within the traditional ambit of diplomatic protection, namely the nationality of claims and the exhaustion of local remedies. Due consideration should, however, have been given to the relationship between functional protection by international organizations of their officials and diplomatic protection, as well as to instances in which a State, or an international organization, administered or controlled a territory. In principle, international organizations should be entitled to exercise diplomatic protection in regard to their employees, but a criterion should be established in order to decide whether priority in exercising that right should be accorded to the international organization or to the State of nationality of the person in question. It would also be advisable to consider the question of diplomatic protection in the context of the administration of a foreign territory or State by another State or an international organization. While the topic of diplomatic protection mainly entailed codification, the areas he had mentioned were ripe for progressive development.

68. The draft articles had rightly encompassed the traditional requirements for the exercise of diplomatic protection: unlawful nature of the act, nationality and exhaustion of local remedies. Similarly, they had established the discretionary nature of the right of a State to exercise diplomatic protection on behalf of its nationals. While draft articles 3 and 8 were welcome,

since they allowed protection to be extended to stateless persons and refugees, the threshold of both lawful and habitual residence set in draft article 8 was too high and could in effect leave individuals unprotected. Further consideration could have been given to the preconditions for the effective exercise of diplomatic protection of stateless persons and refugees, even if that would have entailed progressive development consisting in a departure from the rule that only nationals might benefit from the exercise of diplomatic protection.

69. Draft articles 11 and 12 concerning shareholders as subjects of diplomatic protection were a source of major concern, because a balance had to be struck between the rights of corporations and shareholders, in other words between draft articles 9, 11 and 12. The protection given to shareholders was possibly overgenerous and diverged from existing customary international law. A careful analysis of the articles and their commentaries showed that they had been drafted solely on the basis of the *Barcelona Traction* case and that some of the draft provisions put forward covered matters which the Court had not addressed. The draft articles were therefore proposing innovations rather than progressive development. Should shareholders, whether natural or legal persons, really benefit from special protection over and above that already provided for nationals of States in the other draft articles? It would surely be better to deal with shareholders' protection in specific instruments of international law, such as the bilateral investment treaties to which the Commission had referred. Draft article 17 seemed to accept that premise. The Commission should have promoted a solution more solidly anchored in international law, even if it was aiming at progressive development.

70. Draft article 19 on recommended practice, although innovative, was justified in an area such as the discretionary exercise of diplomatic protection by a State. A more prescriptive formula would have been acceptable.

71. It was to be hoped that the draft articles on diplomatic protection and those on the responsibility of States for internationally wrongful acts — two subjects that traditionally went hand in hand — would soon form parallel conventions. Their adoption would constitute a big step towards the consolidation of the law on international responsibility.

72. Addressing the topic of international liability for injurious consequences arising out of acts not prohibited by international law (chap. V of the report), he said that, even though the Commission had decided to submit to the General Assembly a draft preamble and draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, some core issues deserved further reflection. The topic should be analysed in the light of its own history. The Commission had examined prevention before it had focused on the issue of liability in the case of loss occasioned by transboundary harm. The codification and progressive development of international law should be harmonious and coherent. Liability was just one type of international responsibility. Until more work had been done on the broader topic, it might be unwise to advance too far on liability. Whereas the notion of international responsibility was accepted in legal theory and the obligation to make reparation for unlawful acts was a customary norm, liability for lawful acts tended to be governed by conventional rules.

73. The adoption of the draft principles in a General Assembly resolution would be a positive step towards the introduction of measures securing the prompt and adequate compensation of victims of transboundary harm and of measures ensuring that any potential harm or loss from incidents involving hazardous activities was kept to the minimum. The final text should, however, have taken the form of draft articles, not draft principles.

74. The prevention of transboundary harm and international liability in the case of loss from transboundary harm had been considered under the same main topic of international liability for injurious consequences arising out of acts not prohibited by international law. The two temporal aspects of the topic — prevention, or action before transboundary harm could occur, and loss, or the consequences of such harm — should be given equal status, and the measures adopted to deal with those two aspects should be equally binding. Accordingly, if the set of draft articles on prevention created an obligation for States to avert transboundary harm, it would be logical to impose on States an obligation to take the necessary measures to guarantee prompt and adequate compensation and to minimize any potential harm and loss from incidents involving hazardous activities. If a State violated the latter obligation, it should incur

international liability. Those provisions should be embodied in hard law from the very beginning.

75. If the international community was currently willing to countenance only soft law consisting of a set of principles until more work had been done on the question of State responsibility for unlawful acts, the General Assembly resolution should not contain a convention in disguise. The contents of draft principles 1, 2 and 3 should therefore be re-examined, since they were more typical of an international convention. The contents of draft articles 1 and 3 belonged in the preamble.

76. If the Committee decided to opt for a mere declaration of principles, room must be left for further developments in jurisprudence and doctrine. Any list could be rapidly outdated by technological advances, as had been recognized in the commentaries.

77. The State of origin should assume a larger role in providing compensation for victims (draft principle 4). A shared or subsidiary responsibility to cover costs when the operator or other person or entity was incapable of providing the victim with prompt and adequate compensation would be appropriate, since it would ensure that, if the measures referred to in draft principle 4 proved to be insufficient, the victim would not be left to bear the loss. That was even more important when the victim was in the weaker position and depended on prompt and adequate compensation for its or his survival.

78. For all those reasons, while the adoption of a resolution by the General Assembly would be laudable, it was to be hoped that, one day, it would be possible to arrive at a single convention on international liability for injurious consequences arising out of acts not prohibited by international law, where the responsibility of the State would be established and a proper system of compensation put in place.

79. **Ms. Belliard** (France), referring to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, said that because the concept of a hazardous activity was defined in draft principle 2, paragraph (c), as an activity involving a risk of causing significant harm, it was hardly surprising that the draft principles raised as many questions as they answered. On some points the Commission had discharged its task successfully, as in draft principle 7, paragraph 1, which encouraged cooperation among States by recommending that every effort should be made to conclude specific agreements concerning compensation, response measures and international and domestic remedies. By contrast, in draft principles 5 and 6 more prescriptive language was used, and the notion of compensation was addressed in terms more appropriate to the law on responsibility for internationally wrongful acts.

80. In its work on Guiding Principles relating to unilateral acts of States, the Commission had decided to confine itself to acts "taking the form of formal declarations formulated by a State with the intent to produce obligations under international law". It should perhaps have stated more explicitly that the draft Guiding Principles were not intended to cover all unilateral acts of States. They did have the merit of bringing together, in readily accessible form, elements scattered through the international jurisprudence. Some of the language used, in either the text or the commentaries, might prove difficult to accept, such as the question of arbitrary revocation or the notion that declarations addressed to the international community might contain *erga omnes* undertakings. However, the key point was that the Commission had redrawn the crucial link between the concept of a unilateral act and the expressed intention of a State. In view of the difficulties the Commission had experienced in the past in dealing with the topic, it had wisely chosen to facilitate the codification process by reconvening the open-ended Working Group.

81. She was surprised that the Commission had devoted only three meetings to the report of the Study Group on the question of fragmentation of international law and that it had merely taken note of that report, which had been "finalized" by the Chairman of the Group. The Commission appeared to be acting only as a temporary receptacle for a study conducted outside its remit, the conclusions of which were not to be attributed to it.

82. Turning to the topic of diplomatic protection, she welcomed the adoption on second reading of the draft articles, surely one of the most significant achievements of the Commission over the past five years. A number of improvements had been made to the text on second reading. As the new wording of draft article 1 made clear by defining diplomatic protection as a particular means of invocation by a State of the responsibility of another State, the text now complemented the articles on State responsibility for internationally wrongful acts. She welcomed the

codification of the most obvious features of such an invocation, which was defined in draft articles 2 and 3 as the right of the State of nationality, in accordance with the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case. The draft articles provided useful definitions of the exercise of diplomatic protection, the exhaustion of local remedies and possible exceptions. It was also an exercise in progressive development, allowing for protection by States of legal persons other than corporations.

83. In some respects, however, the draft articles lost sight of their subject matter and ventured into other areas of law: draft articles 8 and 19 seemed to have more to do with the legal protection of human rights than with diplomatic protection properly speaking. Yet the Commission's stated intention in the commentary of confining itself to "rules governing the admissibility of claims" reduced the scope of the draft articles and made them less suitable for solving the problems which tended to arise in contemporary practice in the exercise of diplomatic protection. In the articles dealing with the State of nationality of corporations and their protection, the decision to give priority to the State of the place of incorporation rather than of the seat of the corporation could prove controversial. In that respect, she preferred the version adopted on first reading. Retaining draft article 11, paragraph (b), was likely to cause particular difficulty. Nonetheless, her delegation was in favour of an international convention on the subject of diplomatic protection.

84. **Ms. Pasheniuk** (Ukraine) said that, in spite of the emergence of the human rights system, diplomatic protection of individuals was still of major importance, as shown by recent cases before the International Court of Justice. She welcomed the Commission's efforts to reduce the topic to essential rules and secondary norms. Any other approach, such as defining breaches of substantive law, would have led to insurmountable difficulties. The obligation to exhaust local remedies must be distinguished from the State's obligation to offer access to its courts. Her delegation also agreed with the Commission that neither the Calvo Clause nor the clean-hands doctrine was sufficiently acceptable to be addressed within the present draft articles.

85. A manageable legal regime would best be achieved by focusing, at the present juncture, on the right of States, and States only, to exercise diplomatic protection. However, in future the topic could perhaps be extended to include the right of international organizations to do so, because they were performing an increasing role in international relations, even with regard to the protection of individuals. It should be ensured that the injured individual in whose interest a claim to diplomatic protection was raised would benefit from it. The problem of the relationship between the individual and the State in that context should be given some consideration.

86. Turning to the content of the draft articles, she said that she shared the Commission's approach to the continuous nationality of a natural person, as expressed in draft article 5, paragraph 1. However, the concept of "predominant" nationality in draft article 7 could give rise to some very subjective interpretations. She endorsed in principle the notion of "refugee" in draft article 8, although the definition went far beyond the scope of the provisions of the Convention relating to the Status of Refugees and its Protocol and would require careful consideration to render it compatible with that instrument. Draft article 8 framed a temporal requirement for lawful and habitual residence on the part of a stateless person or a refugee in the State exercising diplomatic protection. However, in many cases where the protection was needed, the injury would have occurred before the person's entry into the territory of the State concerned. She would prefer to substitute the term "permanently resident in that State" for "habitually resident in that State" in draft article 8, paragraphs 1 and 2. In draft article 9, the two separate criteria for corporations — their registered office and their seat of management — would deprive some corporations of diplomatic protection. The link required for legal persons was in conformity with the judgment of the International Court of Justice in the *Barcelona Traction* case, but, contrary to the *Nottebohm* case, no such link was required for natural persons.

87. **Mrs. Daskalopoulou-Livada** (Greece) said that her delegation had consistently supported the idea of the Commission taking up the codification of diplomatic protection. There was now a proliferation of *leges speciales* whereby problems previously addressed through diplomatic protection were increasingly being dealt with by other means.

88. Her delegation broadly supported the Commission's draft. In draft article 9, however, no balance was struck between the two options for determining the nationality of a legal person. The State

under whose law a company was incorporated was given undue priority by comparison with the State where the company's seat of management was located, which had to meet three separate conditions. Clearly, the underlying belief was that the State of the seat would only exceptionally be the State of nationality of a corporation. There was no convincing reason for that approach, and the conditions set for the latter State should be moderated. In draft article 15, too many exceptions were allowed to the rule on the exhaustion of local remedies, and there was a risk they would overlap. The exception in paragraph (e) seemed especially contrived and was difficult to understand. A normative text should be clear and precise and should not require any commentary to be understood.

89. She could see no reason for separate treatment of the subjects covered in draft articles 16 and 17, both of which contained a subsidiarity rule. Draft article 17 merely added a reference to treaty provisions for the protection of investments. The two articles ought to be combined.

90. While agreeing with the general thrust of draft article 18, she had misgivings about the drafting. The Commission's statement, in its commentary, that the right of the flag State could not be categorized as diplomatic protection was questionable. The rule that the flag State, as the State of nationality of a ship, had the right to seek redress on behalf of the crew was well founded in State practice, case law and doctrine and had been supported by the International Tribunal for the Law of the Sea in the *Saiga* case. It did not, however, prevent the ship's crew as individuals from benefiting from the diplomatic protection of their State of nationality if that State wished to offer it. Moreover, as explained in paragraph (9) of the commentary, the flag State would have the right to seek redress for crew members who were illegally arrested and detained following an illegal arrest of the ship itself.

91. She agreed with the recommended practice in draft article 19 for the exercise of diplomatic protection. However, the provisions lacked strength by being non-mandatory in nature, and she would have preferred the Commission to take a bolder approach. Finally, she hoped the draft articles would eventually become a convention, in tandem with those on State responsibility with which they were closely aligned.

92. She expressed satisfaction at the adoption of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. They represented a major contribution in a rapidly evolving field of international law. The clarification in draft principle 2 that a State might also be a victim in the sense of suffering damage was needed mainly for the purpose of compensating damage to the environment, because in most cases only the State or its subdivisions would have the necessary *locus standi* to formulate a claim. The draft principles should, in her view, apply not only to transboundary damage as defined in draft principle 2, paragraph (e), but also to damage to the global commons, at least where the damage arose from response measures undertaken by a State or other entity. It seemed obvious that whichever party bore the cost of response measures should be the recipient of compensation from the polluter's State of origin.

93. Her delegation welcomed the regime of strict liability established by draft principle 4. However, the primacy of the operator's duty to provide compensation was not reflected in draft principle 4, paragraph 2, which provided for it to be imposed on another "person or entity" where appropriate. That would water down the application of the polluter-pays principle, putting it in competition with other options, contrary to recent practice which placed increasing emphasis on the requirement that the polluter should pay. She welcomed the provision in draft principle 5 that a mechanism for channelling liability in accordance with draft principle 4 would not absolve the State of origin from its obligation to take measures to mitigate the damage. In draft principle 7, she felt that the term "particular categories of hazardous activities" should be supplemented by the addition of "and/or specific types of environmental damage". The Kiev Protocol of 2003 applied, not to pre-defined categories of hazardous activities, but to a particular kind of environmental damage, namely, that which affected transboundary wastes.

94. Her delegation strongly believed that the draft principles should form the primary material for a future general convention, provided that a clear definition of "hazardous activities" was adopted.

Agenda item 153: Requests for observer status in the General Assembly (*continued*) (A/C.6/61/L.2-L.4)

Observer status for the OPEC Fund for International Development in the General Assembly (A/C.6/61/L.3)

95. **Mr. Alanazi** (Saudi Arabia) said that the delegations of Mali and Morocco wished to be added to the list of sponsors of the draft resolution.

96. *Draft resolution A/C.6/61/L.3 was adopted.*

Observer status for the Indian Ocean Commission in the General Assembly (A/C.6/61/L.2)

97. **Mr. Soborun** (Mauritius) said that the following delegations wished to be added to the list of sponsors of the draft resolution: Bangladesh, Barbados, Cape Verde, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Dominica, Fiji, Gabon, Guatemala, Guinea, Haiti, Ireland, Liberia, Libyan Arab Jamahiriya, Nauru, Nepal, Rwanda, Saint Lucia, Solomon Islands, Sri Lanka and Swaziland.

98. *Draft resolution A/C.6/61/L.2 was adopted.*

Observer status for the Association of Southeast Asian Nations in the General Assembly (A/C.6/61/L.4)

99. **Ms. Sarne** (Philippines) said that the following delegations wished to be added to the list of sponsors of the draft resolution: Austria, Belgium, Canada, Cyprus, Denmark, Finland, Germany, Italy, Mauritius, Netherlands, Portugal, Republic of Korea, Serbia, Slovenia, Spain and Sweden.

100. *Draft resolution A/C.6/61/L.4 was adopted.*

The meeting rose at 1.05 p.m.

United Nations

A/C.6/61/SR.11

General Assembly
Sixty-first session

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Summary record of the 11th meeting
Held at Headquarters, New York, on Thursday, 26 October 2006, at 10 a.m.

Chairman: Mr. Gómez Robledo .... (Mexico)

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Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*)

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The meeting was called to order at 10.05 a.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Ms. Escobar Hernández** (Spain) said that her delegation was pleased overall with the set of draft articles on diplomatic protection. Among the major contributions of the draft articles were the reaffirmation of diplomatic protection as a right of the State, the maintenance of nationality as the basic criterion for the exercise of diplomatic protection, and the definition of continuity of nationality as the period extending from the date of injury to the date of official presentation of the claim. The draft articles in their final form ably addressed diplomatic protection of natural persons, the specific problem of shareholders and the exhaustion of domestic remedies. The explanations in the commentaries on the differences between diplomatic protection and consular assistance and on the concept of "predominant nationality" had answered many questions previously raised by Spain.

2. The draft articles struck a good balance between codification and progressive development of the law. Draft article 8 was an appropriate response to the need to ensure protection of refugees and stateless persons, while draft article 19 laid emphasis on the ultimate beneficiary of diplomatic protection. However, since draft article 19 was cast in the form of recommendations, it appeared to be out of keeping with the overall form of the draft articles and might benefit from redrafting.

3. In the view of her delegation, the work on diplomatic protection had advanced sufficiently for the elaboration of a convention on the topic. It supported the Commission's recommendation in that regard and considered that it would be appropriate for the General Assembly to establish an ad hoc committee to prepare a draft convention on diplomatic protection based on the Commission's text.

4. In adopting a set of draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the Commission had taken another important step forward in its work on the large complex of questions concerning international responsibility. However, her delegation failed to understand why the Commission had opted to cast its work in the form of non-binding principles and merely to recommend that the General Assembly should endorse the draft principles by a resolution and urge States to take national and international action to implement them. The topic of responsibility, being central to the entire legal system, should be addressed through normative texts properly speaking, not through "soft law" texts. Moreover, there was no reason why different treatment should be given to prevention of transboundary harm from hazardous activities and the allocation of loss arising out of such activities, particularly since the latter concerned real victims. Such differentiation could undermine effectiveness and should be avoided. Her delegation would prefer that all the aspects of international responsibility should be given the same treatment and would like to see the draft principles in the future take the form of a convention; it was therefore premature for the Assembly to adopt a resolution such as the Commission recommended.

5. With regard to its long-term programme of work, the Commission must, of course, continue to respond to new situations and new developments in international law. However, the new items added to its programme of work must accord with the Commission's mandate and allow for the best use of available resources. The topics chosen should be those that were best suited for codification and reflected needs actually felt by States. Among the new topics selected by the Commission, her delegation gave special weight to those relating to the exercise of State jurisdiction with an international dimension, which formed an identifiable group within the topics selected.

6. **Mr. Henczel** (Poland) said that his delegation supported the Commission's recommendation that the draft articles on diplomatic protection serve as the basis for the elaboration of a convention. He noted, however, that they did not address some important issues, in particular the idea that persons had a right to the protection of the State of which they were nationals. The traditional doctrine of the State's absolute right to decide whether or not to exercise diplomatic protection on behalf of its nationals needed to be adapted to contemporary practice, particularly since the constitutions of many States guaranteed the individual's right to diplomatic protection and thereby offered substantial evidence of *opinio iuris*. That right was not only intended to ensure that a national injured abroad had access to the State's consular officials but was also enforceable under the municipal law of the

States concerned. Poland held that the State of nationality had a legal duty to exercise diplomatic protection on behalf of an injured person, upon request, and that without such a request, the State had the legal duty to do so if the injury resulted from a grave breach of *jus cogens* norms of international law attributable to another State.

7. His delegation also supported the Commission's recommendation that the General Assembly should endorse by a resolution the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities and urge States to take national and international action to implement them. His delegation shared the view that the final form of the second and concluding part of the work on international liability should not be different from that of the first part, on the preventive aspects. In that connection he recalled that in 2001, the Commission had recommended to the General Assembly that the draft articles on prevention of transboundary harm from hazardous activities should form the basis for the elaboration of a convention. The current draft principles on allocation of loss were well balanced, firmly based on existing practice and numerous international instruments and constituted an important step in the implementation of international law in that field. However, the relationship of the draft principles to the articles on State responsibility and to article 60 of the Vienna Convention on the Law of Treaties required further study. His delegation agreed that the main basis of the draft principles should be "polluter pays" and "all damage should be covered" and that the financial burden should fall on the operator of the activity causing the damage. He therefore welcomed the stipulation in draft principles 6 and 8 that remedies should be available to enable the victims of damage to obtain reparation. With regard to the definition of damage contained in draft principle 2 (a), he suggested that the words "in particular" should be inserted so as to leave the way open for future developments, and that the reference to cultural heritage should be omitted, unless special rules were proposed on liability for damage in that area. Compensation for damage caused by hazardous activities should be not only prompt and adequate, as specified in draft principle 3, but also effective and proportional; the conduct of the operator should also be taken into account. That triple requirement was in line with the principles governing State responsibility and highlighted the mutual connections between the two systems.

8. While the Commission had made only limited progress on the topics it had taken up the previous year (expulsion of aliens and the effects of armed conflicts on treaties), it had finalized its work on four important topics. It had thus, at the end of its five-year term, left a rich heritage for further work in the following years in the form of two categories of topics, those started in the past two years and those already well advanced, which were expected to be finalized in the near future. Poland appreciated the Commission's constant efforts to maintain its substantial engagement with major issues in contemporary international law and fully supported the inclusion in its long-term programme of work of the five topics on which syllabuses had been usefully provided in annexes to the report. However, his delegation had doubts about reopening the topic on the most-favoured-nation clause since the basic policy differences that had prevented the General Assembly from taking action on the Commission's earlier draft articles on the topic had not yet been resolved. In conclusion, he commended the Commission for its work during its fifty-eighth session and for its achievements over the quinquennium. The significance of the topics addressed and their codification for both the theory and the practice of contemporary international law could not be overestimated.

9. **Mr. Horváth** (Hungary) drew attention to the Commission's significant achievement in completing the second reading of the draft articles on diplomatic protection and on international liability in case of loss from transboundary harm arising out of hazardous activities. However, some of the topics on its agenda, such as reservations to treaties, were still awaiting completion after a number of years. With regard to its decision to include five new topics in its long-term programme of work, his delegation attached most importance to the issue of the immunity of State officials from foreign criminal jurisdiction and the question of the jurisdictional immunity of international organizations. Owing to the heavy workload of the Commission, he was more hesitant about the inclusion of other topics.

10. Concerning diplomatic protection, his delegation's view was that State practice and case law had already established a regime of clearly defined principles and specific rules which were now largely part of customary law and indeed of treaties, such as the articles on State responsibility. The adoption of the draft articles on diplomatic protection codified a

chapter of customary law complementary to the topic of State responsibility. He supported the adoption of the draft articles.

11. Turning to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, he explained that because of its vulnerable position in the Danube water basin Hungary had consistently advocated a proper legal regime to govern such losses. In the past few years, however, it had been able to conclude bilateral agreements on the matter with its neighbours. His delegation would therefore have preferred a set of draft articles to a set of draft principles. He did, however, agree with the Commission's remark in its report that draft principles would have the advantage of not requiring a harmonization of national laws and legal systems, and that the goal of widespread acceptance of the substantive provisions was more likely to be met if the outcome was cast as principles (para. 12 of the general commentary). His delegation could accept the draft principles provided all interested countries contributed to fulfilling the goal stated in their preamble of putting in place appropriate and effective measures to ensure that those natural and legal persons, including States, that incurred harm and loss as a result of such incidents were able to obtain prompt and adequate compensation.

12. **Mr. Panahiazar** (Islamic Republic of Iran) noted that the draft articles on diplomatic protection were rightly concerned only with the rules governing the circumstances in which diplomatic protection might be exercised and the conditions that must be met before it could be exercised; they did not seek to determine the ways in which a person might acquire the nationality of a State, a topic which was not within the Commission's mandate. In draft article 4, the Commission eloquently stated the right of States to determine who their nationals were. His delegation believed that States, in exercising that right, should avoid adopting laws that increased the risk of dual or multiple nationality or statelessness.

13. The "predominant nationality" test contained in draft article 7 remained a subjective criterion, since there were no objective criteria or decisive factors to be taken into account in determining which nationality was predominant. The draft article was not based on customary international law, which recognized the rule of the non-opposability of diplomatic protection against a State in respect of its own nationals, and it was premature for such a step to be taken in the context of the progressive development of international law. In the commentary to draft article 7, the Commission had cited awards of the Iran-United States Claims Tribunal as recent sources for the evolution of the rules of international law in the field of diplomatic protection. His delegation disagreed. Most of the awards of that Tribunal in cases of dual nationality concerned the law of treaties and the interpretation of the Algerian Declaration signed by those two Governments in 1981 rather than diplomatic protection. Moreover, most of the disputes brought by claimants with dual nationality involved a private party on one side and a Government or government-controlled entity on the other, and many primarily revolved around issues of municipal law and general principles of law. The inclusion of such a controversial article made it impossible for otherwise interested States to approve the final text.

14. Extending diplomatic protection to corporations, covered in chapter III of the draft articles, was in most cases unnecessary, as the circumstances in which corporations performed their activities and the procedures for settlement of disputes were largely regulated by bilateral and multilateral treaties. With regard to the exception of undue delay set out in draft article 15, subparagraph (b), slow proceedings should not be considered ipso facto a reason for allowing an exception to the local remedies rule. For unavoidable reasons, judicial proceedings were more time-consuming in some countries than in others. Judicial authorities should not accord different treatment in the administration of justice to their own citizens and foreign nationals, since equality before the law and non-discrimination were generally accepted principles.

15. **Mr. Dufek** (Czech Republic) said that the draft articles on diplomatic protection adopted by the Commission at its fifty-eighth session were one of the major achievements of the quinquennium and a substantial contribution to the codification and progressive development of international law. They duly reflected the recognized rules of customary international law in that area or, when those rules were not clear, were weighted in favour of the broader protection of the rights of injured persons. His delegation supported that approach, as reflected for instance in the decision, in draft article 5, paragraph 1, to consider the *dies ad quem* for the exercise of diplomatic protection to be the date of official presentation of the claim rather than the date of its

resolution and in the exemption from the continuous nationality rule, in draft article 5, paragraph 2. Some of the draft principles marked a step forward in the progressive development of the international law rules of diplomatic protection, in particular draft articles 8 and 19. Draft article 8 closed a gap in the international protection of stateless persons and refugees, while the importance of draft article 19 lay in the fact that diplomatic protection was often the only effective remedy to secure the protection of persons injured through an internationally wrongful act of another State. His delegation would, however, welcome a more detailed commentary, over and above the commentary to draft article 5, on situations involving the death of the injured individual, especially as a consequence of a significant injury caused by a foreign State, before the official presentation by that individual's State of nationality of a claim in respect of the injury.

16. With regard to the future form of the draft articles, he said that they should, for the time being at least, remain non-binding. The General Assembly should adopt a resolution taking note of the draft articles, with an annex reproducing them in full, as it had done in 2001 in the case of the articles on the responsibility of States for internationally wrongful acts. There was a connection and a similarity, in both substance and nature, between the two sets of draft articles. Even in non-binding form the draft articles on diplomatic protection could serve all practical purposes and would provide, in practice as well as in theory, a complex and highly authoritative set of guidelines in that field.

17. On the issue of the Commission's future agenda, the Czech Republic believed that the focus should be on topics for which there was abundant case law and established State practice, or on topics that reflected the consistency and continuity of the Commission's work, rather than on passing concerns. "Immunity of State officials from foreign criminal jurisdiction" and "Jurisdictional immunity of international organizations" were excellent examples of such topics.

18. **Mr. Troncoso** (Chile) said that the ninth report of the Special Rapporteur on unilateral acts of States (A/CN.4/569 and Add.1), which the Commission had taken into consideration in adopting its Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, constituted a valuable contribution to the legal doctrine on the topic through its systematic treatment of the scarce State practice that could be compiled and the international case law and writings of jurists on the subject. In so doing, the Special Rapporteur had strictly complied with the Commission's mandate and the requests of delegations in the Sixth Committee.

19. On the matter of the invalidity of unilateral acts, as in other matters touched upon, the Special Rapporteur's ninth report adhered closely to the provisions of the 1969 Vienna Convention on the Law of Treaties. Chile had always supported that approach as a starting point for analysis. In general, his delegation agreed with the inclusion of the categories of grounds for invalidity of unilateral acts proposed by the Special Rapporteur, namely, invalidity on the grounds that the representative lacked competence, invalidity related to the expression of consent and invalidity of a unilateral act contrary to a norm of *jus cogens*. However, with respect to the coercion of a representative of a State (draft principle 7, para. 4), it would be more appropriate to word the guiding principle in an imperative and not merely a facultative manner ("coercion ... may be invoked"), since the resulting invalidity was absolute and could not be remedied by subsequent confirmation. The wording should be in line with that of the other two grounds of absolute invalidity. The provision concerning corruption of a representative of a State (draft principle 7, para. 3) would be more strictly correct if reworded as follows: "Corruption of the representative of the State may be invoked as grounds for declaring a unilateral act invalid if the expression of consent to be bound by that act was formulated owing to the corruption of the person formulating it". The issue was not the formulation of the act but the expression of consent to be bound "owing to corruption". Once again using the 1969 Vienna Convention on the Law of Treaties as a guide, the Special Rapporteur had correctly identified the grounds that could result in the termination, modification, suspension and revocation of a unilateral act (principles 8 and 9).

20. With respect to matters considered on earlier occasions and revisited in the ninth report, Chile fully concurred with the definition of a unilateral act proposed by the Special Rapporteur (principle 1), which focused on unilateral acts *stricto sensu* and excluded consideration of conduct that might produce similar effects. In identifying the persons having competence to formulate unilateral acts on behalf of a State (principle 3), Chile favoured a restrictive

approach; any extension of competence to persons other than heads of State, heads of Government and ministers for foreign affairs should be considered an exceptional situation requiring irrefutable evidence that the State was willing to be bound by such persons. With respect to the basis for the binding nature of unilateral acts (principle 10), his delegation considered it unnecessary to have a principle specifying that the basis was good faith and intent to be bound, since good faith was a basic principle of all legal systems, especially in the sphere of obligations, while intent to be bound was an inherent subjective element of all acts intended to produce legal effects. Concerning the interpretation of unilateral acts, Chile fully concurred with the Special Rapporteur that restrictive criteria were called for, since it was uncommon for States to assume obligations, in other words, to limit the exercise of their powers in the international sphere, on their own initiative. Hence, in the case of reasonable doubt as to whether an obligation had been assumed through a unilateral act, the presumption should be negative.

21. The text of the Guiding Principles and commentaries thereto adopted by the Commission at its fifty-eighth session constituted an adequate summary of the principles formulated by the Special Rapporteur and clarified several doubtful issues in the latter's report. His delegation believed that, although the elaboration of a regime applicable to all unilateral acts and conduct might be a lengthy task, the work already done should be continued until, at the least, a set of guidelines was elaborated to guide States in their practice, and the Guiding Principles adopted by the Commission could be considered a step in that direction.

22. **Ms. Zabolotskaya** (Russian Federation) said her delegation would prefer the Commission to give priority, in its long-term programme of work, to the protection of persons in the event of disasters and jurisdictional immunity of international organizations. A third topic favoured by her delegation was extraterritorial jurisdiction.

23. The draft articles on diplomatic protection adopted by the Commission appeared to be a happy blend of codification and progressive development of the international law on the subject. Draft article 1 offered a good definition of diplomatic protection. She supported the Commission's decision to confine to its commentary the nature of the distinction between diplomatic protection and consular assistance, although the latter should have been termed "consular protection", in order to reflect the language used in treaty practice. The Commission had managed to avoid the issue of whether the right to protection derived only from the State or also from the injured national. She agreed, however, with its assumption that diplomatic protection was essentially an act of invocation by a State of the responsibility of another State. It was on that assumption that the Commission had based its provisions on the nationality of claims and the exhaustion of internal remedies. She also agreed with its premises, in draft articles 5 and 10, concerning the continuous nationality of natural persons and corporations. The requirement of continuous nationality was framed clearly and the temporal boundaries within which continuity could be presumed were reasonable. Those temporal boundaries were important for determining the admissibility of claims. It would have been somewhat illogical to posit a link between admissibility and a loss of nationality occurring after the presentation of a claim. In any event, draft article 5, paragraph 4 and draft article 10, paragraph 2. provided a safeguard for cases where a person or corporation acquired the nationality of the State against which the claim was brought after the date of the official presentation of the claim.

24. The Commission had rightly included in the draft articles provisions to cover cases of multiple nationality. As the commentary to draft article 6 observed, dual or multiple nationality was a fact of international life. Situations where claims were made on behalf of persons holding multiple nationality should be dealt with in accordance with the general principles of law governing the satisfaction of joint claims.

25. She welcomed the solution of the "cumulative criterion" adopted in draft article 9 for a State to qualify as the State of nationality of a corporation. She was doubtful about the decision, in draft article 15 (a), to lower the threshold for the exhaustion of local remedies. However, the wording of that provision represented a considerable improvement over the earlier version. The provision in paragraph (a) of draft article 11, on the protection of shareholders, was controversial and could be abused. Draft article 13, on the protection of legal persons other than corporations, could have been omitted. It seemed to be premature, because there were no customary rules as yet to cover

the subject. However, as a whole the draft articles were well-balanced and deserved adoption in the form of a convention. A special working group or committee could be established to formulate the introductory and concluding provisions of the draft. Another option would be to postpone discussion of the draft until the fifty-ninth session of the Commission, when it would be discussing the appropriate action to be taken with regard to the articles on State responsibility for internationally wrongful acts. However, her delegation took the view that the present draft articles could stand alone and should not be tied to those on State responsibility.

26. Turning to the general topic of international liability for injurious consequences arising out of acts not prohibited by international law, she said that in view of the paucity of treaty rules in that area the Commission had taken the best possible approach by deciding to prepare guiding principles to govern liability in case of loss from transboundary harm arising out of hazardous activities. Her delegation endorsed the chosen scope of application of the draft principles, from which the Commission had rightly decided to exclude damage to the environment occurring beyond the boundaries of national jurisdiction. She endorsed the inclusion of the qualifier "significant" for the types of damage in question. She also agreed with the Commission that it would not be fruitful to attempt to draw up an exhaustive list of the activities to which the draft principles should apply. She endorsed its decision to exclude from the scope of draft principle 4 an obligation for States to compensate victims of transboundary damage, stipulating merely that each State "should take all necessary measures" to ensure the payment of compensation. That wording reflected the fact that the draft principles dealt only with activities not prohibited by international law. She supported the Commission's endeavour to establish strict liability for the operator in the case of transboundary harm, but it should be noted that international legal instruments governing particular aspects of substantive liability made provision for circumstances in which no liability arose for the operator, for instance when the harm occurred as the result of natural disasters or armed conflict, or where the State of the operator had not taken all the steps required by international law vis-à-vis the operator. Those exceptions ought to be included in the commentary, although it would be desirable to include them in the text of the draft principles.

27. In draft principle 2 the Commission had opted for an all-inclusive definition of "damage", which included damage to the environment. The definition was an acceptable one at the current juncture, although it prompted some doubts on the part of her delegation. Generally speaking, her delegation was in favour of the draft principles, which could be adopted by the General Assembly in the form of a declaration. However, in view of the shortage of time for delegations to study them, her own delegation would not object to postponing consideration of the draft principles to the fifty-ninth session of the Commission. Lastly, it would also be logical for the Commission to revert to the question of adopting draft articles on the prevention of transboundary harm, which would complement the present draft, although the two drafts should not be treated as interdependent.

The meeting rose at 11.25 a.m.

United Nations A/C.6/61/SR.12

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Summary record of the 12th meeting
Held at Headquarters, New York, on Friday, 27 October 2006, at 10 a.m.

Chairman: Mr. Gómez Robledo .... (Mexico)

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The meeting was called to order at 10.05 a.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. McRae** (Canada), commenting on the suitability of placing the most-favoured-nation clause on the Commission's long-term programme of work, said that, although policy differences preventing the adoption of earlier articles on the topic had still not been resolved, developments in the situation since 1978 had created an environment where consideration of that topic might prove more fruitful.

2. The most-favoured-nation clause had its foundation not only in ancient treaties, but also in more recent agreements which applied the notion to goods, investments and even trade in services. That conceptual evolution alone provided fertile ground for further analysis.

3. World Trade Organization (WTO) and bilateral investment agreements provided for dispute settlement; hence a body of jurisprudence related to the most-favoured-nation principle was emerging. The case law of WTO panels and its Appellate Body, as well as that of the International Centre for Settlement of Investment Disputes and other investment tribunals, all provided further material for reflection. Whether the non-discrimination principle inherent in the notion of the most-favoured nation applied in the same way in the different areas of trade, investment and services was a serious question facing Canada in the context of investment disputes under chapter 11 of the North American Free Trade Agreement (NAFTA). An elucidation of the scope of the most-favoured-nation obligation might be of immense value to newer and smaller States which were currently entering into bilateral investment agreements, but which did not have the resources to undertake a comprehensive analysis themselves.

4. While the concept of most-favoured nation had historically been related to the fields of trade and investment, it also resonated within the broader sphere of international law. Its similarities with and dissimilarities from the principle of non-discrimination in other branches of international law would benefit from the Commission's careful consideration. The most-favoured-nation principle fundamentally sought to prevent discrimination as between foreigners. The relationship between the principle of non-discrimination and the related principle of national treatment aimed at preventing discrimination between foreigners and nationals was extremely interesting. Similarly, the relationship between varying standards of non-discrimination and notions of an international minimum standard of treatment ought to be investigated as well. Any examination of the most-favoured-nation principle would involve a study of how different branches of international law related to each other and thus it would, in a sense, constitute a specific application of the Commission's work on fragmentation.

5. The Commission should therefore give serious consideration to the inclusion of the topic in its long-term work programme in order that it might focus on an area with practical implications whenever States concluded and applied treaties affecting their economic affairs. Its inclusion would also be in keeping with the Commission's own traditions in the codification and progressive development of international law, where it combined and adapted the practice and learning of the past with current needs, thereby contributing to the building of a responsive and coherent legal order.

6. The Commission had demonstrated a welcome flexibility in its treatment of the topic of international liability in respect of transboundary harm arising out of hazardous activities, in that it had proposed that the principles it had drafted on the allocation of loss in the event of such harm should be adopted in a General Assembly resolution recommending that States should pursue national and international action to implement those principles. Many of the provisions represented desirable practice for States to follow, rather than an agreed state of international law. The commentaries were rich in detail and testified to the thoroughness of the Special Rapporteur and the Commission.

7. Nevertheless the notion of "significant damage" might be ambiguous; the explanation in paragraph (1) of the commentary to draft principle 2 that the term "significant" was designed to prevent "frivolous or vexatious claims" suggested a relatively low threshold. On the other hand, paragraph (2) of the commentary stated that "[T]he harm must lead to a real detrimental effect" on human health or property. That wording implied a rather higher threshold. That divergence could possibly lead to wide discrepancies in the application of the principles.

8. Disparities in the level of the threshold might result in a distinction being drawn between the rights of victims injured as a result of transboundary harm within the State of origin and the rights of victims outside the State of origin, who might be compensated only in respect of "significant harm". Although the draft principles were grounded in the notion of setting an international minimum standard, if the difference between national treatment and the international minimum standard was too great, claims about discriminatory treatment might have some substance since, if the threshold was low, such discrimination might not exist, but if the threshold was high it might.

9. The idea of a precautionary principle was apparently gaining recognition among States. The draft principles had, however, wisely set out obligations of compensation and response rather than attempting to resolve the more theoretical issue of the status of the notion of "precaution". Ultimately the way the principles proposed by the Commission were applied in State practice might settle that issue.

10. **Mr. Hernes** (Norway), speaking also on behalf of the Nordic countries Denmark, Finland, Iceland, Norway and Sweden, said that the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities were a significant step forward in the development of international law on civil liability. They supplemented the rules on prevention and the articles on State responsibility for damage to the environment of other States and areas beyond the limits of national jurisdiction. Liability rules played an important role as far as compensation for victims was concerned and they provided an incentive for the prevention of damage. The draft principles laid down a minimum standard which should be taken into account when formulating further rules on liability in multilateral legal instruments, including those concerning the environment.

11. The principles were general in nature, which meant that their effective implementation would require the adoption of detailed national and international rules and regulations. It would, however, have been difficult for the Commission to proceed much further than it had done. Continued cooperation was therefore necessary between States in various forums.

12. The polluter-pays principle must guide the implementation of draft principle 4 and it was also of relevance when the threshold of "significant damage" was applied. That term set a standard which should be interpreted in the light of scientific developments, the precautionary principle and the development of international environmental law. Although a standard lower than "significant damage" would have been preferable, the Commission had judiciously rejected proposals for a higher threshold.

13. The principles supplemented the responsibility of States under international law, but did not in any way replace or reduce it. On that understanding, the draft principles should be endorsed in a General Assembly resolution and their speedy implementation ought to be encouraged. The draft articles on prevention of transboundary harm from hazardous activities ought to be adopted in conjunction with the draft principles on liability.

14. **Mr. Medrek** (Morocco) said that the International Law Commission's fifty-eighth session had been particularly productive. Its achievements had included the adoption of a set of draft articles on diplomatic protection, an issue which was linked to the responsibility of States for internationally wrongful acts. The text regulated in a balanced manner the conditions for the admissibility of diplomatic action and mostly reflected customary international law on the matter. Developments in contemporary international law had affected the scope of diplomatic protection and the conditions for its exercise. Some noticeable improvements had been made to the text of the draft articles during the second reading.

15. The new, more open-ended, wording of draft article 1, which did not answer the question of whether a State was acting in its own right, or on behalf of the individual, or both, was more attractive. Draft article 2 reaffirmed the principle established in the dictum of the Permanent Court of International Justice in the *Mavrommatis Palestinian Concessions* case, but the principle had been rendered more flexible to take account of changes of nationality and to cover stateless persons and refugees. The incorporation in draft article 8 of the phrase "in accordance with internationally accepted standards" had introduced a wider standard extending to persons who would not all come within the scope of the 1951 Convention relating to the Status of Refugees and the Protocol thereto.

16. His Government agreed with the scope of the provisions on diplomatic protection and with the idea

that it was for the State of nationality, at its discretion, to exercise diplomatic protection on behalf of its nationals, no matter whether they were legal or natural persons, if they had been injured by an internationally wrongful act of another State. It also supported the Commission's position on continuous nationality and likewise held that a State was entitled to exercise diplomatic protection on behalf of a natural person who had been a national of that State continuously from the date of injury to the date of the official presentation of the claim.

17. The new formulation of draft article 9 had clarified which State could be deemed the State of nationality of a corporation for the purposes of exercising diplomatic protection. As for draft articles 11 and 12, it was a moot point whether it was advisable to go further than the findings of the International Court of Justice in the *Barcelona Traction* case. The protection given to shareholders in a corporation was too generous, bearing in mind the rapid changes which could occur in share ownership in the modern international economy.

18. The provisions of draft article 14 were commendable and fully in line with the ruling of the International Court of Justice in the *Interhandel* and *Elettronica Sicula S.p.A. (ELSI)* cases. He expressed support for the first exception listed in subparagraph (a) of draft article 15 and welcomed the amendments made to subparagraphs (c) and (d) of that draft article. It would be advisable to defer any decision on the adoption of an international convention on diplomatic protection until States had had enough time to examine the draft articles in depth.

19. The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities would be a useful guide which would contribute to the development of international law in that field, since it dealt with hazardous activities not yet covered by specific bilateral, regional or international arrangements. While the provisions of draft principle 3 were perfectly acceptable, the Special Rapporteur's analysis of the term "significant damage" was somewhat ambiguous. The General Assembly should adopt a resolution embodying the draft principles and urging States to take national and international actions to implement them.

20. The General Assembly ought to revive its tradition of referring subjects of relevance to the international community to the International Law Commission for their codification and progressive development.

21. **Mr. Bhata** (India), endorsing the International Law Commission's approach to the topic of diplomatic protection, said that the draft articles affirmed the customary rules of international law that a State had a right, rather than an obligation, to exercise diplomatic protection and that a State could exercise diplomatic protection only in favour of its nationals. Draft article 5 on continuous nationality was important because, if a person changed their nationality, the dates and periods relevant to the determination of continuous nationality were crucial when deciding whether diplomatic protection could be exercised. The provision on multiple nationality was in line with the customary principle of international law upheld by the International Court of Justice in the *Nottebohm* case. As for draft article 11, the injuries of all shareholders, whether domestic of foreign, must have equal status and the purpose of any exercise in diplomatic protection should be solely to ensure compensation that was no less prompt and adequate than that given to national shareholders. The scope of draft article 13 was too wide and therefore required further careful examination.

22. The draft articles could form the basis of a binding legal instrument and ought to be taken up the following year, along with the topic of the responsibility of States for internationally wrongful acts, as the two subjects were interrelated.

23. The Commission had basically made the right choice in respect of the topic of international liability in the case of loss from transboundary harm arising out of hazardous activities, in that it had decided that the regime should be general and residual and allow States enough flexibility to fashion specific rules on liability in particular sectors of activity. In any set of provisions governing liability, or the allocation of loss, the operator should bear primary liability as that person was in command and control of the activity in question and therefore had a duty to redress any harm caused. While some States favoured civil liability regimes which were largely sectoral in nature, strict liability regimes were preferable for hazardous activities, since there were a number of other actors which should share the operator's responsibility. It was to be hoped that States would take national and international actions to implement the draft principles.

24. **Mr. Seger** (Switzerland) said that it was most useful to recall and summarize the international legal rules relating to diplomatic protection. By and large, the International Law Commission had drawn the right conclusions in that connection. However, he wondered whether an instrument codifying the law on diplomatic protection was pertinent in contemporary international law. The current situation had indeed changed dramatically since the early years when the individual had had no place in the international legal order. Since then, a clear trend had emerged towards recognizing the fact that natural and legal persons had the legal capacity to assert their rights directly before international courts, by virtue of conventions drawn up for that very purpose. Many bilateral investment treaties provided that disputes between investors and the host State could be submitted to the arbitration of the International Centre for Settlement of Investment Disputes. Moreover, in several regions of the world, individuals could secure the protection of their fundamental rights through international courts. Was it therefore necessary for States parties to the European Convention on Human Rights to turn to classical diplomatic protection in order to safeguard rights covered by the Convention? Admittedly such instruments did not exist everywhere, or did not always function and diplomatic protection was sometimes therefore the only remedy. Yet, in view of the conventional framework which States offered individuals, diplomatic protection was tending to become a subsidiary means to which recourse was had only when the legal or natural persons concerned had no possibility of asserting their rights in their own right.

25. The commentary had made it plain that the chief purpose of the draft articles on diplomatic protection was to protect corporations qua legal persons and, through them, their investments. Yet diplomatic protection was often hard to exercise with respect to international corporations, because identifying the nationality of a corporation was becoming increasingly complicated. As a result of globalization, corporations saw themselves more and more as multinational, or transnational, entities whose connection with a particular State could alter and was sometimes guided by economic opportunism. To what extent should a State still engage in the international defence of the interests of a corporation whose "national" character had almost disappeared?

26. The aim of those questions was not to cast doubt on the value of diplomatic protection as an instrument for defending legal persons' rights against a State which flouted them. Diplomatic protection was, however, a right, not an obligation, of a State. The customary nature of that right could not be called into question and no international convention on diplomatic protection must weaken that customary right. The draft articles should specify more clearly that that customary right was unaffected, so as to avoid giving the impression that, in the future, the exercise of diplomatic protection would be conditional upon the ratification of that convention.

27. Switzerland's practice was to refrain from giving a person holding dual nationality diplomatic protection against his or her other State of origin. On the other hand, it took the criterion of predominant nationality into account, if it was called upon to afford a person with dual nationality diplomatic protection against a third State. The Swiss authorities normally granted diplomatic protection only to persons with predominantly Swiss nationality. Draft articles 6 and 7 therefore constituted a relaxation of the conditions regarding nationality and offered States a wider opportunity to provide protection, if they so wished.

28. His Government was in favour of permitting the exercise of diplomatic protection in favour of stateless persons and refugees. The requirement that they should be "lawfully resident" was, however, superfluous for, in practice, no State would grant diplomatic protection to a stateless person or refugee who did not satisfy the requirements of the law. That factor would be meaningful only as grounds for objection on the part of the requested State and therefore seemed somewhat artificial.

29. The definition of the nationality of a corporation set forth in draft article 9 posed more of a problem. While it was possible to accept the theory that the law under which a corporation was incorporated was a factor determining the nationality of a corporation, the principle of control ought to be retained as an alternative criterion. Draft article 9 did allow some exceptions to the principle it laid down, subject to some strict and cumulative conditions. Even if the theory on which it was based had the merit of being clear, because normally it was easy to determine under what law a corporation had been set up, it established a formal, rather than a substantive, connection with the State which was supposed to defend the corporation's

interests through diplomatic protection. As an enterprise could comprise several corporations in various countries, it might be hard to ascertain which State was competent to exercise diplomatic protection. Furthermore the location of a corporation's head office could change fast. In view of the increasingly volatile nature of the geographical and economic links between corporations and their host States, the draft articles ought to be amended in order to permit the State which was ultimately going to represent a corporation in an international dispute to require a more substantial connection with that corporation. Control over a corporation would create such a connection because it protected persons with an economic stake in the corporation. Another determining factor might be the location of the effective economic activities of a corporation, because it was in that State that the corporation created jobs and paid its taxes.

30. Draft article 19 corresponded to current Swiss practice, but the advisability of inserting such a provision in a convention was questionable, since the draft article in question dealt with a question of municipal law, whereas the set of draft articles as a whole was devoted to the conditions for exercising diplomatic protection between States. Moreover, for the sake of coherence, it would be preferable for the draft articles not to contain both binding rules and non-binding recommendations.

31. A period of reflection was required for a thorough discussion of the substance and form of the draft articles on diplomatic protection. The relationship between the measures taken to secure diplomatic protection and the articles on the responsibility of States for internationally wrongful acts should also be studied in greater depth, especially with regard to lawful countermeasures when diplomatic action and other methods of peaceful settlement had failed to resolve the dispute generating the request for diplomatic protection.

32. **Mr. Hernández García** (Mexico) said that for his country diplomatic protection, including safeguarding the rights of all its nationals, was a central feature of foreign policy. The Commission's work on diplomatic protection was highly relevant for the progressive development of international law, given the close and obvious link between that topic and State responsibility, and its connection with the question of the treatment of aliens. In general terms, he found the draft articles to be an acceptable outcome of the past session's work on the topic, and he supported the Commission's recommendation for preparing a convention on that basis. The General Assembly would, he hoped, decide on the convening of a working group to consider the draft articles with that end in view.

33. His delegation was especially interested in the question of the exhaustion of local remedies. On the rule concerning exceptions, set out in draft article 15, he believed that it was for the State against which a claim was brought to show that local remedies had not been exhausted, and to specify which remedies remained open to the claimant. If avenues of redress still remained, the burden of proving an exception to the rule of exhaustion should pass to the claimant.

34. Diplomatic protection was the right of the State of nationality, to be exercised in accordance with draft article 1. The text of draft article 1 was, however, formulated in such a way as to leave open the question whether the State exercising diplomatic protection did so in its own right or that of its national, or both. The individual concerned was therefore, apparently, the subject of a number of primary rules of international law which protected him against his own Government and, when abroad, against foreign governments. That placed him in a better position than in the past to determine the scope of diplomatic protection. The recommendation in draft article 19 that States should take into account the views of injured persons with regard to resort to diplomatic protection and reparation became relevant in that light. The right to diplomatic protection could be limited by other rules of international law, such as treaty provisions for the protection of investments, referred to in draft article 17, or an express declaration by investors that they would not resort to the diplomatic protection of their governments, by means of the so-called "Calvo Clause". Aspects of the topic of diplomatic protection on which delegations had commented could be examined in greater depth within a working group established by a decision of the General Assembly.

35. Turning to the question of international liability in case of loss from transboundary harm arising out of hazardous activities, he said that the activities generated by scientific and technological progress posed particular risks to the environment and to natural resources. International liability for such risks was not dependent on the existence of fault. It arose from a primary obligation of the State of origin to assume

liability for acts occurring on its territory, by whomsoever they were carried out. His delegation had always advocated an integral approach to the topic and the Commission had, rightly, dealt first with the prevention aspect, on which it had provided a set of draft articles which, his delegation agreed, should form the basis of a convention. It was therefore surprised that the Commission had presented its work on the second and fundamental part of the topic, namely that relating to liability, in the form of draft principles. The substantive content of "principles" was bound to be more general than that of "articles" of a future convention, and that would have a negative impact on the regime to be established. The current procedure was unjustified, given that in 2001 the Commission had prepared the articles on international responsibility for internationally wrongful acts, as well as the draft articles on prevention of transboundary harm from hazardous activities. Since the draft currently before the Committee was of limited scope and did not offer an integral solution to the question of international liability, his delegation would not wish it to be adopted as a convention without prior consideration of the topic by some intergovernmental body. The draft should preferably be reviewed, bearing in mind the interrelationship between prevention and liability to which General Assembly resolution 56/82 referred, in order to produce a text reflecting the importance of ensuring the protection and preservation of the environment.

36. In the preamble to the draft principles, the liability regime which followed from a failure of prevention appeared to differ from that which followed from the damage and loss inflicted on the victim. The seventh preambular paragraph noted "that States are responsible for infringements of their obligations of prevention under international law", but the fifth preambular paragraph and draft principle 4 dealt only with compensation for victims incurring harm or loss as a result of hazardous activities (liability). His delegation took the view that the State should nevertheless be made responsible in such cases, and that liability should not be placed solely on the operator or other entity, as stated in draft principle 4, paragraph 2. States of origin should bear at least residual liability when they failed to prevent environmental damage, because hazardous activities which might have an adverse impact on the environment were deemed to be authorized by them. He agreed, however, that proof of the hazardous nature of the activities should not be required from an innocent victim of damage, and that the regime decided upon should be one of strict liability. The operator should be required, as proposed in draft principle 4, to provide insurance, bonds or other financial guarantees to ensure that compensation could be paid in the event of transboundary damage resulting from its activities. In that connection, the environmental and other criteria laid down in the Principles for Responsible Investment launched by the Secretary-General of the United Nations should be borne in mind. As for response measures, those specified in draft principle 5 would make it possible to identify the obligations arising for the State of origin, together with the role to be played by other parties, if an incident occurred. It would be desirable to develop specific international regimes for certain categories of hazardous activities, but not at the price of forgoing the adoption of general rules applicable to all cases.

37. The question of expulsion of aliens, to be considered by the Commission at its next session, was closely bound up with the protection of human rights. It was vital to develop a consistent legal regime, which would entail considering all aspects of the question. Despite certain existing general principles which were uncontroversial, such as the right of States to expel aliens whose presence they considered undesirable for national security reasons, or the general prohibition against mass expulsions, international law had yet to settle other, more controversial aspects of the topic. Certain general principles could be derived from existing international instruments, such as those relating to human trafficking or the smuggling of migrants, or from bilateral agreements on repatriation. All the rules in the existing instruments were based on certain understandings, such as the human right of trafficked persons to return to their countries of origin and to be accepted there, and respect for due process and the safety and dignity of the human person. States did not have an unqualified right to expel aliens, and any discussion based on the understanding that they did would be of questionable validity. The limits to their discretion in the matter should be properly defined in international law.

38. **Mr. Ojo** (Nigeria) said that to avoid inconsistency, the definition of diplomatic protection in article 1 of the Commission's draft should immediately mention the exceptions provided for in draft articles 3, paragraph 2, and 8. He therefore suggested including in

draft article 1, after "a national of the former State", the phrase "or to other persons in accordance with the present draft articles". In draft article 8, paragraph 3, the provision made for diplomatic protection for refugees and stateless persons was excluded where the internationally wrongful act had been committed by the State of nationality of the refugee. That might amount to double jeopardy for a refugee from a State which had flagrantly breached his fundamental freedoms. Some redrafting might therefore be needed for draft article 8. Under draft article 9, a corporation controlled by nationals of a State other than the State of incorporation would have the nationality of the persons in question, leaving out of account any situation in which the relocation of a business and its seat of management itself constituted the injury for which diplomatic protection was needed. The draft article should be reworded to prevent such an anomaly. He supported the Commission's recommendation for a convention on diplomatic protection, but considered that more time was needed for delegations to consider the draft articles.

39. He expressed preliminary general agreement with the draft articles on international liability in case of loss from transboundary harm arising out of hazardous activities. However, more time was needed to study them in depth.

40. Concerning the topics to be chosen for the Commission's long-term programme of work, he supported the inclusion of the question of the immunity of State officials from foreign criminal jurisdiction. His delegation was confident that due priority would be given to the need for State officials to enjoy such immunity, for the sake of stable relations among States. He also supported the inclusion of the other four topics proposed by the Commission for future study.

41. **Ms. Pino Rivero** (Cuba) said the draft articles on diplomatic protection were a significant contribution to the codification and progressive development of international law, combining a number of scattered customary rules and developing others which were not yet being uniformly applied. The definition in draft article 1 made it clear that diplomatic protection was a right, but not a duty, of the State of nationality. Her delegation fully supported the provisions in draft article 5 requiring continuous nationality on the part of injured natural persons, and those in draft article 8 extending diplomatic protection to stateless persons and refugees. She also supported the formulation in draft article 14 on the exhaustion of local remedies, and the practice recommended for States in draft article 19. In a world where, as a result of international trade and tourism, people were constantly on the move from one country to another, diplomatic protection was increasingly important and the applicable rules were in need of codification. Her delegation therefore supported the Commission's recommendation for an international convention on the subject.

42. **Mr. Khan** (Pakistan) said the draft articles on diplomatic protection were a sound compilation of the rules of customary international law on the subject. He agreed with the definition in draft article 1, which was drawn from the broader context of State responsibility for wrongful acts. He also agreed with the thrust of draft article 7, on multiple nationality, but felt it would be appropriate to lay down agreed parameters for "predominant" nationality, a concept not otherwise found in international law.

43. The requirement in draft article 14 for the exhaustion of local remedies raised the question of the differing nature of local remedies from one State to another, some being rudimentary and others comprehensive in nature. It was even possible that some local remedies could be used to avoid invoking diplomatic protection. His delegation preferred to consider that aspect further before taking a final position.

44. In draft article 19 (c), the notion of "reasonable deductions" by the State of nationality from compensation transferred to the injured person was essentially ambiguous. It could be manipulated or lead to exaggerated assessments by claimant States. The notes to draft article 19 should recommend a clearer framework for such deductions.

45. His delegation took the view that more time was needed to consider the draft articles before beginning work to prepare a convention on the topic. He suggested that the General Assembly should take note of the draft articles at the current stage, leaving the work of drafting a convention to a later stage.

46. His delegation welcomed the work done by the Commission on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and the development of the draft principles on international liability in case of loss from transboundary harm arising out of hazardous activities. The draft principles set out an essential list

of measures needed in order to protect potential victims, and provided a basis for establishing international liability for transboundary harm. He supported the definition of damage in draft principle 2 as "significant", and the scope given to the term "environment" to include natural resources, both abiotic and biotic. The definition of "hazardous activity" in draft principle 2 was likewise appropriate. While supporting the compensation mechanism proposed in draft principle 4, he recommended including within the principle a provision for a third-party damage assessment mechanism, to settle disputes relating to the claims arising from incidents of damage. He endorsed the suggestion by the delegation of China that an international fund should be established to pay the compensation. However, such a fund should not act to limit the liability of the "operator", as defined in draft principle 2.

47. Lastly, he supported the Commission's recommendation that the General Assembly should endorse the draft principles by a resolution and urge States to take national and international action to implement them.

48. **Ms. Peeckman** (Observer for the International Federation of Red Cross and Red Crescent Societies), speaking on the Commission's long-term programme of work with special reference to the topic of protection of persons in the event of disasters, said that in the past few decades the world community had witnessed a sharp increase in both the number and the impact of non-armed conflict disasters. As the largest humanitarian network, the International Federation of Red Cross and Red Crescent Societies (IFRC) had always been committed to ensuring that those affected by disasters, particularly the most vulnerable, received the necessary relief in a timely, effective and well-coordinated manner. Although most natural disasters could be successfully addressed by domestic authorities and civil society, some exceeded national coping capacities and required international assistance. In such cases, adequate regulatory frameworks were essential to guarantee the speed and effectiveness of overall disaster response.

49. Before they could bring aid to disaster victims, international providers of humanitarian relief often faced obstacles in the import of relief goods and equipment; delayed or refused entry of relief personnel; difficulty in obtaining recognition of professional qualifications or work permits for relief workers; inability to acquire a national legal personality; problems with the use of vehicles and aircraft; and taxes, fees and tolls. Affected Governments, on the other hand, frequently complained of inappropriate aid, untrained or incompetent international relief workers, disrespect for cultural traditions or local capacity and failure to coordinate. All such challenges caused delays, added subsidiary costs and affected the ability of aid workers to provide life-saving assistance in humanitarian emergencies. Although some were not legal problems per se, appropriate regulatory frameworks could help in addressing them.

50. The Federation had long been instrumental in the development and promotion of standards, guidelines and recommendations in that field, including the measures to expedite emergency relief adopted in 1977 by the International Conference of the Red Cross and Red Crescent and the United Nations Economic and Social Council, the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief adopted in 1994 and the Sphere Project Humanitarian Charter and Minimum Standards in Disaster Response, developed in 2000.

51. In its constitutional role as a coordinator of disaster response, the Federation had set up the International Disaster Response Laws, Rules and Principles (IDRL) programme in 2001 to reduce the suffering of people affected by non-armed conflict disasters by raising awareness, promoting implementation and strengthening the laws, rules and principles that would ensure timely, adequate and efficient international response to disasters. The IDRL programme had compiled and analysed existing international and national legal instruments pertaining to international assistance to non-armed conflict disasters. Its research indicated that at the international level the regulatory framework for international response to disasters was disparate and composed of heterogeneous instruments of varying weight, reach and substantive scope. Moreover, international laws, rules and principles were insufficiently known and applied at the national level. National disaster management legislation rarely addressed the issue of how international aid would be initiated, facilitated, coordinated and regulated. In the absence of adequate disaster preparedness, ordinary legislation not adapted to the needs of a disaster situation often continued to

be applied. Ad hoc measures were usually not well disseminated and were frequently revised. In other cases, the sheer number of international actors tended to overwhelm rather than complement domestic response mechanisms.

52. The initial findings had been endorsed by the twenty-eighth International Conference of the Red Cross and Red Crescent, which had adopted its Agenda for Humanitarian Action to lead collaborative efforts in research and advocacy on IDRL questions. The IDRL programme has developed a publicly available IDRL searchable database, carried out further case studies, organized workshops and surveyed the various stakeholders. In the coming year, the Federation would complete a comprehensive study of the matter and launch a series of high-level regional consultations on the drafting of a declaration of principles, for presentation to the Conference in 2007, to serve as a guide for the development of the critically required national legislation in the field.

53. The Federation warmly welcomed the timely interest manifested by the Commission in including the topic of protection of persons in the event of disasters in its long-term programme of work and would of course consider inputs from the Commission in its 2007 recommendations. The Commission could be assured of the Federation's support in its future work on the topic. Unlike international humanitarian law, international law applicable to natural disasters was relatively fragmented and undeveloped, and steps to codify it could save lives and alleviate human suffering.

Statement by the President of the International Court of Justice

54. **The Chairman**, welcoming the President of the International Court of Justice, said that the Committee members were aware of her great interest in their work; they in turn were keen observers of the Court's activities and greatly admired its work. The decisions of the Court were invaluable for States and the Committee as a means of determining the rules of international law, and in its advisory role the Court was invaluable to the United Nations. The Committee looked forward to the continuing dialogue.

55. **Ms. Higgins** (President of the International Court of Justice) said that the Committee's work on the development and codification of international law was of the highest importance to the International Court of Justice. As for the work of the Court, it was accessible to all via its website, a new updated, expanded and interactive version of which would be launched shortly.

56. Without repeating the information on the Court's activities during the past annual reporting period just presented to the General Assembly and contained in the Court's report (A/61/4), she would like to share some thoughts on a relatively recent phenomenon: the increasing importance of remedies as an issue of litigation at the International Court of Justice. The determination of an appropriate remedy was integral to the Court's role in the peaceful settlement of a dispute and formed the link between the judicial phase and the post-judicial implementation of the judgment. It was the concrete outcome of the litigation, which the parties would have to explain to their domestic audiences.

57. The only reference to it in the Statute of the Court was to be found in article 36, paragraph 2 (d), which provided that States parties might declare that they recognized the compulsory jurisdiction of the Court with regard, inter alia to "the nature or extent of the reparation to be made for the breach of an international obligation". Beyond that, and subject to any specific remedies requested in a special agreement of the parties, the issue of remedies was in principle left to the discretion of the Court. However, to a significant extent the Court was in the hands of the parties. It was to the final submissions put to the Court on the closing day of hearings that the Court must reply, and what the parties were asking the Court to find was becoming increasingly complex. For many years, it had been usual for the applicant State to ask simply for a declaration of a breach of an obligation by the other party, so that a short and uncomplicated *dispositif* would suffice. But since coming to the Court in 1995 she had noticed that very detailed findings of diverse points of law were required, and the declaration of the substantive violation was less frequently found to be a sufficient remedy in and of itself.

58. An important preliminary point that must always be determined was the scope of the Court's competence to deal with requests for remedies. Where the Court was applying or interpreting a particular treaty, the question had been raised whether some separate head of jurisdiction was needed to specify a remedy for any breach of the treaty. In the *LaGrand* case (*Germany v. United States of America*), the United States had argued

that certain remedies sought by Germany formed part of the law of State responsibility and were thus outside the treaty concerned. The Court had made it clear that no separate basis for jurisdiction was required for the Court to consider the remedies a party had requested for the breach of an obligation. The same argument had been raised and the same response given in the case concerning *Avena and other Mexican Nationals (Mexico v. United States of America)*.

59. Assuming there was no jurisdictional hurdle, the Court had to determine how much freedom it had in fashioning remedies and how the "appropriate" remedy was to be ascertained. In the *LaGrand* case, the United States had argued that an apology was regarded as the appropriate remedy for a violation of article 36 of the Vienna Convention on Consular Relations; however, the Court had not seen any clear pattern of State practice in that regard and had not accepted that argument.

60. Nor had it accepted the Applicant's argument that the remedies should include a guarantee or assurance of non-repetition of the illegal acts. Such a remedy caused major evidentiary problems for a court, raising the question of what evidence was sufficient to show the likelihood that a breach would occur again in the future, whether such evidence must relate to the nationals of the Applicant in the case, from whom the evidence should emanate, at what stage of the litigation it should be produced and to what tests it should be subjected. To date the Court had treated requests for guarantees of non-repetition with considerable caution. In the *LaGrand* case the Court had considered that the commitment expressed by the United States to ensure implementation of its obligations under article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations must be regarded as meeting Germany's request for a general assurance of non-repetition. In the *Avena* case the Court had applied similar reasoning, observing that the United States had been making considerable efforts to ensure that its law enforcement authorities provided consular information to every arrested person they knew or had reason to believe was a foreign national. The Court had also declined to order guarantees of non-repetition in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* for different reasons. Each State had claimed that its military was lawfully present in the Bakassi Peninsula; with the clarification by the Court as to where title lay, the Court had not been prepared to envisage a situation where either party, after withdrawing from the other's territory, would fail to respect the territorial sovereignty of that party.

61. The Court had also not accepted the requested remedy of the annulment of illegal acts where not appropriate in the circumstances of the case. In the *Avena* case, Mexico had argued that the proper remedy for a conviction against the background of a violation of the Vienna Convention on Consular Relations was annulment, essentially requesting the Court to open the prison door. However, the Court had held that it was not the conviction and sentences of the 52 Mexico nationals, but rather certain preceding breaches of treaty obligations, that constituted the violation of international law, so that the partial or total annulment of the conviction or sentence was not the appropriate remedy.

62. In the *LaGrand* and *Avena* cases the Court had ultimately fashioned its own remedy. In the *LaGrand* case it had determined that the United States should, by means of its own choosing, allow the review and reconsideration of the conviction and sentences by taking account of the violation of the rights set forth in the Vienna Convention. In the *Avena* case it had revisited that remedy, holding that the special clemency procedure being used was not sufficient in itself, although it could perform a supplementary role. States parties were asking the Court for an ever wider range of remedies, but ultimately it was the Court that decided the appropriate remedy for each case.

63. For some types of violations, compensation would appear to be the appropriate remedy, but the issues regarding compensation were so complex that it had become customary to leave the quantification of damages to a second round, should there be a failure of the parties to reach an agreement based on the judgment. Constantly in the Court's mind was the question of how many findings of specific facts it must make at the merits phase in order to have in place what might be necessary at a later compensation phase. Often, in order to keep a complex case operationally manageable, the litigation case was "broad-brush". In the *Cameroon v. Nigeria* case, the Applicant had taken a global approach to the claim of "unlawful occupation" rather than asking for findings on specific incidents. In the *Congo v. Uganda* case, The Applicant had used specific incidents as examples, but the Court had been led to believe that any further claim of

compensation would be with respect to the overall situation. Moreover, the Applicant in that case had prudently reserved the nature, form and amount of compensation to another phase, and the Court had encouraged the parties to seek an agreed solution bilaterally, in good faith, on the basis of its findings in the judgment. Such questions as how to quantify compensation for an unlawful military action or the compensation value of an occupation of a part of the territory could be best answered in a negotiated agreement between the parties.

64. Some States seemed to think that in order to obtain a determination by the Court as to a particular remedy it was necessary to ask for a separate finding that responsibility had been incurred as a consequence of a breach. However, a party could ask for a remedy for a violation without a formal, separate finding of responsibility, as had been the clear practice in a long line of cases. That practice was consistent with what the Court had said in the *Temple of Preah Vihear* case (*Cambodia v. Thailand*), namely, that a request for an order of restitution was "implicit in, and consequential on, the claim of sovereignty itself".

65. The Court had never yet made a finding that a State's responsibility was engaged in a case that mainly focused on territorial title, as, for example, *Cameroon v. Nigeria*. A separate finding of responsibility could be valuable in cases where the attribution of unlawful conduct to a Government was a key issue, but even in such cases it was not always needed as a "stepping-stone" between illegality and remedy. Parties to many such cases had asked the Court for a finding of a breach of a specific obligation coupled with a request for compensation or another remedy, without requesting a separate finding of State responsibility. The latter would require separate pleadings and a detailed examination of the law of responsibility, thus adding expense and time for all involved. Given the busy docket of the Court, asking it to take that extra step would have real implications for its efficiency.

66. The developments she had mentioned in the realm of remedies had added to the complexities of the Court's work. The field of remedies had expanded far beyond the issuance of simple declarations of a breach of an international obligation. The Court must clarify the jurisdictional basis, disentangle the concepts of illegality and responsibility and work towards a realistic approach to remedies that best utilized the strengths of the Court and best served the interests of the parties.

67. **Mr. Lehmann** (Denmark) said that in the *Passage through the Great Belt* case between Finland and Denmark (1991), the Court had welcomed negotiation between the parties with a view to a friendly settlement. He wished to know whether the President of the Court considered it to be necessary, possible or advantageous for the Court to make itself available to the parties during the proceedings for the purposes of an out-of-court settlement. That would be helpful in view of its heavy workload.

68. **Ms. Higgins** (President of the International Court of Justice) said that when the Court was entrusted with a case, it was required to give a legal answer to the issues placed before it, provided that they were within its jurisdiction; to do otherwise would be an abnegation of its duty. In the case referred to, which came within an uncertain area of law, the fact that the Court had not considered it warranted to indicate provisional measures had contributed to the feeling that an agreed solution needed to be sought. As far as she was aware, no circumstance had ever arisen in the course of the Court's proceedings such that one or more of the parties might deem it not in its interest to push for a conclusion. If, however, the parties were to come to the President with the request that the Court make itself available to them for the purposes of a friendly settlement, then that would be an interesting avenue to explore.

69. **Mr. Bethlehem** (United Kingdom) asked whether the Court's procedures were adequate to deal with technical issues of assessment of compensation, considering that no specific expertise was normally available to it for that purpose. On a related matter, he wondered whether statements on remedies could be regarded as an intrusion into the domestic sphere. He noted the establishment of an increasing number of ad hoc tribunals, such as investment tribunals, whose judgments were considered to constitute such an intrusion.

70. **Ms. Higgins** (President of the International Court of Justice) said that within the Court there was considerable expertise in that regard by virtue of the previous experience of members of the bench; moreover, its rules provided for the use of experts, if necessary. In cases where the question of compensation could not be settled bilaterally, the Court would want to pursue the matter by all the means available to it.

The question of intrusion was a sensitive one, and nowhere more so than when domestic criminal justice systems were involved; the Court would always seek to intervene in domestic matters to the least possible extent.

71. **Mr. Kim** Sun-pyo (Republic of Korea) inquired about the Court's discretionary power in the determination of remedies. He asked whether its consideration of possible remedies was confined to the options proposed by the parties or whether it could also consider other options.

72. **Ms. Higgins** (President of the International Court of Justice) said that if, in the final submissions of the parties, the Court was requested to find in favour of a specific remedy, then it must consider that remedy and determine whether there were any reasons why it might not feel able to grant it; indeed it had no choice in the matter. However, once it had completed its consideration, it had the inherent discretion to review and reconsider the question and to fashion its own remedy, while taking care to intrude into the domestic system as little as possible.

73. **Mr. Hernández García** (Mexico) said that the President of the Court had given a concise but comprehensive presentation of the Court's criteria for determining compensation; he appreciated that it had to proceed on a case-by-case basis. It would nevertheless be useful to know what latitude it allowed itself. In the *Avena* case, it had not been the intention of Mexico to request the Court to open the prison door. It had held that the United States' violation of article 36 of the Vienna Convention on Consular Relations was a ground for annulment of the conviction of the 52 arrested persons. There was a causal connection between the violation of the treaty and the original conviction; that should be taken into account in the reparation. He expressed satisfaction with the Court's decision that the United States should review and reconsider the conviction against the background of the violation of the Vienna Convention, but would have wished that the Court take greater account of the causal connection.

74. **Ms. Higgins** (President of the International Court of Justice) said that, while she appreciated the views expressed by the representative of Mexico, she could not add any further comment to a judgment that had been passed. She had felt it appropriate to share the Court's thinking on the matter with the members of the Sixth Committee, but it would not be proper for her to say any more.

75. **Mr. Hmoud** (Jordan) said that notwithstanding the difficulty, mentioned by the President of the Court, of quantifying compensation in situations of military occupation, the Security Council had been able to do so, through its Compensation Commission. He wished to know whether the Court could order the establishment of another body or mechanism to determine compensation.

76. **Ms. Higgins** (President of the International Court of Justice) said that she could not answer the question hypothetically. The difficulty of quantifying compensation did not mean that the Court was incapable of doing so, whether through assistance or other means.

Agenda item 79: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/61/L.6)

77. **Mr. Samy** (Egypt) said that 2006 marked the sixtieth anniversary of the inaugural sitting of the International Court of Justice and that the purpose of draft resolution A/C.6/61/L.6 was to commemorate that event. The Special Commission on the Charter of the United Nations had adopted the draft resolution at its 250th meeting and recommended its adoption. He was gratified to be able to introduce it in the presence of the President of the Court.

78. **Ms. Rivero** (Uruguay) said that the Spanish translation of operative paragraph 1 of the draft resolution contained an error: "*sinceramente*" was not an accurate rendering of "solemnly".

79. **The Chairman** said that, as a representative of a Spanish-speaking country, he agreed with the observation of the representative of Uruguay. The necessary change would be made.

80. *Draft resolution A/C.6/61/L.6 was adopted by acclamation.*

81. **Ms. Higgins** (President of the International Court of Justice) said that she was very touched by the fact that the Sixth Committee had chosen to adopt the resolution in her presence; it was an act of friendship towards the Court that would be greatly appreciated by all her colleagues. The tribute to the work of the Court would further inspire it in its continuing endeavours to assist to the best of its abilities in the peaceful settlement of international disputes.

The meeting rose at 1 p.m.